Original

RECEIVED
NOV 23 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee For Consent to Transfer of Control	)))	CC Docket No. 98-184

COMMENTS OF MCI WORLDCOM, INC.

Anthony C. Epstein
John B. Morris, Jr.
Stuart M. Rennert
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Lisa B. Smith
R. Dale Dixon, Jr.
MCI WORLDCOM, INC.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-2383

David N. Porter
Richard S. Whitt
MCI WORLDCOM, INC.
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 776-1550

Dated: November 23, 1998

TABLE OF CONTENTS

EXECUTIVE SUMMARY

As the third anniversary of passage of the Telecommunications Act of 1996 approaches, two more incumbent local exchange carriers ("ILECs") come to the Commission promising to "unleash" and "jumpstart" local competition and "attack other Bell company strongholds" across the country, but if, *and only if*, they are permitted to combine the monopoly regimes that each has spent the last three years doing anything and everything to preserve. Application for Transfer of Control, at 6-7 ("BA-GTE Appl."). In many ways a carbon copy of SBC's and Ameritech's application, Bell Atlantic's and GTE's pitch contradicts their words and actions before they announced their merger.

GTE has stated publicly for over a year that it intends to compete vigorously in out-of-region local markets against the Bell Operating Companies ("BOCs"). When seeking to merge with MCI in October 1997, it emphasized its ongoing "effort to attack and compete with the RBOCs in their service areas." Letter from Charles Lee, GTE, to Bert C. Roberts, Jr., MCI, at 2-3 (Oct. 15, 1997) (attached hereto as Ex. 11). Before announcing the merger with Bell Atlantic, GTE certainly was not telling its shareholders or the public that it lacked the scale or scope to execute these plans, for example, by offering local service to the myriad customers in Bell Atlantic's region to which it provides Internet service over its interLATA network. To the contrary, it offered sworn testimony that it would soon provide local service in competition with Bell Atlantic in West Virginia even though it has no monopoly local franchise in that state.

It comes as more of a surprise that Bell Atlantic now discerns a corporate imperative to compete-out-of-region. Heretofore, Bell Atlantic made no effort to compete out-of-region at all, honoring the apparent non-aggression pact among the BOCs. Just two years ago, Bell Atlantic assured the Commission that it never even seriously considered crossing the Hudson River to compete in the other parts of the New York metropolitan area. That is in sharp contrast to the "broad-scale attack on the local markets of the other RBOCs across the country" that Bell Atlantic now sees as critical to its future. BA-GTE Appl. 6.

The notion that Bell Atlantic or GTE is by itself each too small, too poor, and too insular to compete as a new entrant in local markets across the country is ludicrous. Bell Atlantic and GTE can do precisely what CLECs like MCI WorldCom are doing without the benefit of monopoly-generated profits — put its money where its mouth is by investing billions of dollars to pry open the local markets dominated by incumbent monopolists. Combining Bell Atlantic and GTE does not enable them to do anything out-of-region that they could not do independently, and the merger is essentially irrelevant to the likelihood that Bell Atlantic and GTE will compete outside their current regions.

Lacking any real upside, the Bell Atlantic-GTE merger presents a huge downside to consumers because it will reduce local competition in their regions. The effect, if not the intent, of the proposed merger would be to raise the barriers to local competition within Bell Atlantic's and GTE's regions by consolidating their monopolies. A Bell Atlantic-GTE monopoly would control over one-third of the nation's local lines. The merger would permit Bell Atlantic and GTE immediately to provide facilities-based local service at a higher percentage of locations of large businesses without any additional investment or reliance on out-of-region ILECs. This would increase GTE's and Bell Atlantic's advantage over CLECs that must undertake the lengthy and expensive process of building out their networks to many of these diverse locations and that depend on the ILEC to reach the rest. Thus, Bell Atlantic and GTE seek to lock up the business of Bell Atlantic's "legion of anchor customers." *See* BA-GTE Appl. 7. Equally important, as explained above, the merger would eliminate GTE as a significant entrant into local markets in Bell Atlantic's region, and vice versa.

The merger would also significantly reduce the ability of regulators, and competitors, to benchmark the performance of GTE and Bell Atlantic. The elimination of yet another large ILEC through merger would mean that there will be fewer points of comparison among major ILECs. The end result may be the worst of both worlds, with Bell Atlantic-GTE selecting the lowest common denominator in those instances where Bell Atlantic and GTE currently have different policies or practices and one is more competition-friendly than the other.

Of course, another immediate impact of the merger would be that GTE would have to stop offering interLATA telecommunications and information services to customers in each Bell Atlantic state (including, but not limited to, Pennsylvania and Virginia) where Bell Atlantic lacks section 271 authority. The Commission should immediately disabuse Bell Atlantic of the idea that it might obtain "transitional relief" from the requirements of section 271. To allow Bell Atlantic to provide interLATA service through an affiliate without satisfying these requirements would remove Bell Atlantic's incentive under section 271 to open up its local markets to competition. Moreover, because the merged entity would control both ends of a higher percentage of interLATA calls, the merger would exacerbate the anticompetitive effects of Bell Atlantic's provision of in-region interLATA services through an affiliate while it still monopolizes local exchange and exchange access services.

Equally important, the Commission should carefully examine the consequences for competition in Internet services if this merger is allowed to proceed. ILECs have bottleneck control over the initial link between Internet users and the Internet — the local loop. The ILECs are leveraging their monopoly control into the Internet by tying their xDSL and Internet services, and by attempting to extend to Internet services the current regime of inflated access charges. Even if ILECs do not receive the regulatory concessions that they are seeking in the section 706 proceedings, the limited availability of xDSL-capable loops and collocation on reasonable and nondiscriminatory terms frustrates widespread competition to provide xDSL services, especially to residential and small business customers.

The merger would give Bell Atlantic and GTE control over access to one-third of all Internet customers in the United States — the same as a combined SBC-Ameritech and more than any other company. As xDSL services become a predominant method of providing access to the Internet, Bell Atlantic's and GTE's continuing monopoly control over xDSL services, as well as over other local services used to access the Internet, would enable them to achieve significant power over Internet services. The existing size and scope of GTE Internetworking would bring Bell Atlantic-GTE even closer to a dominant Internet position. Bell Atlantic-GTE's power over a substantial and disproportionate percentage of Internet customers may give it, especially along with a merged SBC-Ameritech, the critical mass that would permit it to tip Internet competition in its favor.

Both independently and collectively, the two pending BOC mega-mergers — Bell Atlantic-GTE and SBC-Ameritech — are not in the public interest. The Commission should deny each application based on individualized review. The Commission should also analyze the relationship between these two mega-mergers and consider the cumulative adverse impact on competition if both were approved. If the SBC-Ameritech merger were permitted to proceed along with the Bell Atlantic-GTE merger, the two resulting companies could together dominate the provision of local telephone service — and possibly bundled local, long-distance, wireless, and Internet service. When it approved the Bell Atlantic-NYNEX merger, the Commission made clear that at some point it would draw the line against further consolidation of the remaining ILECs. The Commission should draw the line here.

Finally, given the fact that both Bell Atlantic and GTE insist that it is in their corporate interests to compete against other incumbent local monopolists, the facial implausibility of their claim that each is too puny without the merger to compete out-of-region domestically (but not internationally), their existing competition to provide Internet services, and Bell Atlantic's failure in connection with the NYNEX merger to forthrightly present its plans to the Commission, the Commission should investigate the likelihood and scope of actual and potential competition between Bell Atlantic and GTE if they do not merge. As it did in its investigation of the Bell Atlantic-NYNEX merger, the Commission should examine, and make available on a confidential basis to interested parties, the relevant documents that Bell Atlantic and GTE are submitting to the Department of Justice and that relate to the competitive issues at the heart of this merger.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee For Consent to Transfer of Control	)))	CC Docket No. 98-184

COMMENTS OF MCI WORLDCOM, INC.

MCI WORLDCOM, Inc. ("MCI WorldCom") hereby submits its comments opposing the joint application of Bell Atlantic Corporation ("Bell Atlantic") and GTE Corporation ("GTE") for approval of their proposed merger.

I. BELL ATLANTIC AND GTE HAVE THE BURDEN TO PROVE THAT THEIR PROPOSED MERGER WILL ENHANCE COMPETITION IN AFFECTED MARKETS.

Under its now well-established standards for merger reviews, the Commission must determine whether Bell Atlantic and GTE have carried their burden to prove by a preponderance of the evidence that their merger would affirmatively serve the public interest.[1/] The competitive

1/ *See In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor to SBC Communications, Inc., Transferee*, Memorandum Opinion and Order, CC Docket No. 98-25, FCC 98-276, ¶ 13 (rel. Oct.23, 1998) (*"SBC-SNET Order"*); *In re Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, CC Docket No. 97-211, FCC 98-225, ¶¶ 8, 10 (rel. Sep. 14, 1998) (*"MCI-WorldCom Order"*); *In re Application of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee For Consent to Transfer Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities Based and Resold Communications Services*, Memorandum Opinion and Order, 12 Communications Reg. (P&F) 1095, ¶ 11 (1998); *In re Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 F.C.C.R. 19985, ¶¶ 29-36 (1997) (*"BA-NYNEX Order"*).

issues presented by the proposed merger are at the heart of the Commission's analysis. The public interest standard includes "the implementation of Congress' pro-competitive, de-regulatory national policy framework designed to . . . open[] all telecommunications markets to competition." *MCI-WorldCom Order* ¶ 9 (internal quotations omitted). "In order to find that a merger is in the public interest, [the Commission] must, for example, be convinced that it will enhance competition." *BA-NYNEX Order* ¶ 2.

The Commission also "shares jurisdiction with DOJ under sections 7 and 11 of the Clayton Act to disapprove acquisitions of common carriers." *MCI-WorldCom Order* ¶ 8 n.23 (internal quotations omitted). Section 7 of the Clayton Act is a flexible and powerful weapon against anti-competitive mergers in evolving markets. It prohibits mergers whenever there is a reasonable probability that there would be less competition in a given market after a proposed merger than there would be if the merger did not occur. It "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future." *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963). Section 7 is intended to prevent not only the last in a series of mergers that results in actual monopoly, but to stop in its incipiency a cumulative process the ultimate result of which may be a significant reduction in the vigor of competition. *Brown Shoe Co. v. United States*, 370 U.S. 294, 317-18 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957).

The Commission's competitive inquiry is primarily concerned not with the status of competition now, but rather with the effect of the merger on competition in the future. With respect to the local market, the question is not whether the proposed merger will make local markets less competitive (after all, they could not be significantly less competitive than they are now), but whether it will help bring competition to those markets or stand in the way of those markets becoming more competitive.[2/]

Bell Atlantic and GTE do not address the potential effect of the merger on competition for Internet services. With respect to the Internet business, the question is whether, considered in the context of all relevant developments including other proposed and potential mergers among major incumbent local exchange carriers ("ILECs"), the proposed Bell Atlantic-GTE merger will reduce currently robust competition among Internet service providers ("ISPs"). That inquiry must be informed by the size and reach of GTE Internetworking and its established base of customers inside and outside Bell Atlantic's region.

Despite the overwhelming precedent that the Commission has authority to review all salient aspects of their merger, Bell Atlantic and GTE have questioned the jurisdiction of the Commission to review at least certain aspects of the merger. *See* BA-GTE Appl. 25 n.21. Bell Atlantic-GTE's three arguments in a three-sentence footnote are groundless.

First, the limitation of the Commission's jurisdiction in section 2(b) of the Communications Act, 47 U.S.C. § 152(b) with respect to intrastate services does not in any way circumscribe the Commission's review of this merger. The Commission already rejected the contrary contention when it thoroughly examined the impact of the Bell Atlantic-NYNEX merger on local competition. *See BA-NYNEX Order* ¶ 35. Even under the Eighth Circuit's relatively

---

2/ Bell Atlantic and GTE attempt to limit the Commission's focus to the effect of the merger on competition in the market for local services exclusively in Pennsylvania and Virginia. *See* BA-GTE Appl. 25-26 & n.22 (arguing that the "only areas warranting separate discussion are those where Bell Atlantic and GTE have nearby service areas"). There is simply no factual or legal basis for such a limitation. GTE has pre-existing, pre-merger plans to vigorously compete against Bell Atlantic, and Bell Atlantic apparently now considers out-of-region competition vital to its survival. The Commission must examine all geographic local markets where GTE and Bell Atlantic would potentially compete against one another.

restrictive view of the Commission's jurisdiction with respect to the local competition provisions of the Telecommunications Act of 1996, the Commission has authority over some aspects of intrastate service, including the interconnection and unbundling requirements of section 252(c), *Iowa Utilities Board v. FCC*, 120 F.3d 753, 794 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utilities. Bd.*, 118 S. Ct. 879 (1998), so the Commission can and should evaluate the likely effect of the merger on these methods of local competition. In any event, it would not be in the public interest to approve a merger that would reduce local competition, and the broad and expansive scope of the Commission's public interest inquiry under sections 214 and 301 is beyond dispute. *See In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 F.C.C.R. 20543, ¶ 384 & n.990 (1997) (citing cases holding that public interest standard is expansive). Furthermore, "when local services are inseparable from or substantially affect interstate communications, FCC jurisdiction extends into the intrastate realm." *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1220 n.30 (D.C. Cir. 1984). Less competition to provide local exchange and exchange access services, including switched exchange access services, would undeniably "substantially affect interstate communications," and one of the asserted purposes of this merger is to permit Bell Atlantic-GTE to offer bundled local and long distance service at the locations of its large business customers across the country. *Id.* In addition, competition to provide xDSL services directly affects competition to provide interstate information services. *See* Part III.A below.[3/]

3/ Bell Atlantic and GTE do not dispute the Commission's jurisdiction to consider the effect of their proposed merger on competition to provide Internet services, and in any event, the Commission has already found that it does have jurisdiction to consider this issue. *MCI-WorldCom Order* ¶ 142.

Bell Atlantic and GTE provide no citation or support for their second argument that the Commission's "authority to review a transfer of licenses or certificates is properly limited to assessing the interstate uses of those particular licenses or certificates, and does not extend to other aspects of the merger." BA-GTE Appl. 25 n.21. Nothing in the language of section 214, which deals with certificates of public convenience, limits the Commission to consideration of interstate uses of those licenses, and as explained above, the public interest standard is expansive.

Bell Atlantic and GTE also argue that paragraph four of section 7 of the Clayton Act, 15 U.S.C. § 18, exempts situations where "one common carrier extends its lines by acquiring another common carrier, as long as 'there is no substantial competition between' the two carriers overall." *Id.* (citation omitted). The issue is irrelevant because the Commission has plenary review authority under the Communications Act independent of its Clayton Act authority. *See BA-NYNEX Order ¶ 35* (noting disagreement with Bell Atlantic's Clayton Act arguments but declining to address them). In any event, whether or not section 7 covers situations of potential as well as actual competition, Bell Atlantic and GTE's reliance on this section of the Clayton Act merely begs the question of whether there is substantial competition between the parties, a determination that is clearly within the jurisdiction of the Commission. *Navajo Terminals, Inc. v. United States*, 620 F.2d 594, 601 (7th Cir. 1979), cited by Bell Atlantic and GTE and the only case discussing the portion of the Clayton Act upon which Bell Atlantic and GTE rely, established this point when it held that the Interstate Commerce Commission must analyze whether competition between two common carriers could be said to be substantial.

II. CREATION OF A MEGA-BOC SERVING ONE-THIRD OF THE NATION'S ACCESS LINES WOULD MAKE COMPETITIVE ENTRY INTO LOCAL MARKETS EVEN MORE DIFFICULT.

By any objective measure, Bell Atlantic and GTE have monopoly control over local exchange access in their respective regions, and have effectively thwarted local exchange competition in their own regions for more than 2½ years. With this merger, they present a plan to the Commission that would allow them to keep that monopoly for years to come. Their plan to use GTE as an "enabler" for Bell Atlantic's out-of-region strategy is primarily a limited plan to serve the peripheral offices of Bell Atlantic's large business customers. Especially when considered in conjunction with the proposed SBC-Ameritech merger, it is clear that this merger will reduce local competition in numerous substantial ways.

A. Bell Atlantic and GTE retain monopoly control over local exchange access and have frustrated the opening of their markets to competition.

That local competition is in its infancy in the regions controlled by Bell Atlantic and GTE is beyond reasonable dispute. *See* Declaration of Kenneth C. Baseman and A. Daniel Kelley ¶¶ 17 - 20 (attached hereto as Ex. 1) ("Baseman-Kelley Decl."). The Commission recently found that "incumbent LECs continue to dominate the market for local exchange and exchange access service to business customers" and that in many places, "the incumbent LEC's market share is or approaches 100 percent." *MCI-WorldCom Order* ¶¶ 172, 168. Bell Atlantic has not been granted section 271 authority to offer in-region long distance service because it cannot come close to demonstrating to the Commission that its local exchange markets are open to competition. GTE has fought tooth and nail to prevent any CLEC from offering competitive local exchange in its monopoly region.

Bell Atlantic's failure to comply with the conditions imposed by the Commission in connection with its merger with NYNEX is clear evidence that it cannot be trusted to permit local competition to take root in its region. The Commission's order in Bell Atlantic-NYNEX set forth multiple conditions to be complied with subsequent to the merger. *See BA-NYNEX Order* ¶¶ 180-191, Appendices C & D. The purpose of the conditions was to counteract the numerous means identified by the Commission through which the proposed merger could impair competition and harm the public interest. *Id.* ¶¶ 37-156. These conditions relate to the provision of performance monitoring reports, Operations Support Systems ("OSS"), establishment of performance standards, and the price of interconnection, unbundled elements, and collocation. *See generally Id.* Appendices C-D. Several of these conditions had been suggested by Bell Atlantic itself in *ex parte* filings with the Commission. *Id.* ¶ 178. The conditions became effective upon release of the Commission's order in August 1997 and were scheduled to sunset in 48 months.

Ever since completion of its merger with NYNEX, Bell Atlantic has openly ignored the conditions imposed on it by the Commission and has been determined to "run out the clock" on the 48-month period of compliance.[4/] One particularly egregious example is with respect to forward-looking, economic cost-based pricing. The Commission's order is unequivocal: Bell Atlantic must offer rates "for interconnection, transport and termination, or unbundled network elements, including both recurring and non-recurring charges" at "the forward-looking, economic cost to provide those items." *BA-NYNEX Order*, Appendix C, Condition 6. The Commission

---

4/ The problems described in these comments (and addressed in the complaints now pending before the Commission) are not the only ways in which the Bell Atlantic-NYNEX merger conditions have failed to work as the Commission had hoped. MCI WorldCom also encountered problems in other areas, including with non-recurring charges where Bell Atlantic has inflated the amounts billed under the recurring payment option. Of course, the failure to date of major aspects of the Bell Atlantic merger conditions does *not* mean that the Commission should abandon its efforts to enforce these conditions and make them as effective as possible.

made clear that this meant that Bell Atlantic's rates must correspond to the Total Element Long Run Increment Cost ("TELRIC") costing methodology set out in its local competition and universal service decisions. *Id.* ¶ 185 n.345. And Bell Atlantic was required to "negotiate supplements or amendments to existing interconnection agreements where necessary" in order to ensure that pricing was set at forward-looking, economic cost-based rates. *Id.* Appendix C, Condition 9.

Bell Atlantic has proposed interconnection rates that are emphatically *not* TELRIC in Pennsylvania, New Jersey, Delaware, West Virginia, Maryland, Virginia, and the District of Columbia.[5/] Bell Atlantic's pricing models improperly inflate the costs of network elements, often by including both Bell Atlantic's embedded costs and costs attributable to inefficient network operations and technology. Because Bell Atlantic's defiance of the Commission essentially made local competition within most of its region economically unfeasible, MCI WorldCom was compelled to file a section 208 complaint with the Commission in order to seek compliance with the merger conditions regarding TELRIC pricing. *See* Complaint, MCI Telecommunications Corp. v. Bell Atlantic Corp., File No. E-98-12, at ¶¶ 15-18, File No. E-98-12 (FCC filed Dec. 19, 1997) *("MCI Pricing Complaint").* AT&T filed a similar complaint about Bell Atlantic. *See* Complaint, *AT&T Corp. v. Bell Atlantic Corp.*, File No. E-98-05 (FCC filed Nov. 5, 1997) *("AT&T Pricing Complaint").* Both complaints are pending.

For example, in Pennsylvania, recurring rates for unbundled network elements are based largely on Bell Atlantic's methodology which are appallingly high because they are not based on TELRIC. Indeed, the Pennsylvania Public Utilities Commission itself recognized that the Non-

---

5/ Rates have also been proposed in a number of states in the former NYNEX region. The rates proposed in those states were based on cost studies that were prepared and presented by NYNEX. They, too, are seriously flawed and are not consistent with TELRIC.

recurring Cost study submitted by Bell Atlantic was not consistent with a forward-looking TELRIC methodology, economic-cost based approach. *See* Interim Order, *Application of MFS Internet of Pennsylvania, Inc. (MFS - Phase III),* No. A-31023F0002 at 101 (Pa. Pub. Utils. Comm'n. Apr. 10, 1997) ("*PA Order*") adopted in, Final Opinion and Order, *Application of MFS Internet of Pennsylvania, Inc. (MFS - Phase III),* No. A-31023F0002 (Pa. Pub. Utils. Comm'n. July 10, 1997). In New Jersey, Bell Atlantic submitted the same pricing models as in Pennsylvania for recurring and non-recurring charges, and the Commission adopted the non-recurring charge model without modification, and a 60% weighted version of Bell Atlantic's recurring charge model. Telecommunications Decision and Order, *In re the Investigation Regarding Local Exchange Competition for Telecommunications Services, No. TX95120631*, (N.J. Pub. Utils. Comm'n, Dec. 2, 1997) ("*NJ Order*"). The same study for non-recurring charges which the Pennsylvania commission found was not based on forward-looking TELRIC costs (*PA Order*, 101) is the basis for Bell Atlantic's rates in New Jersey — in direct contravention of this Commission's order that it charge TELRIC prices in all of its states. The 60% weighting of Bell Atlantic's model for recurring charges in New Jersey is also not based on the TELRIC approach, and therefore has the effect of including a substantial portion of Bell Atlantic's overstated, backward-looking cost estimates in prices. The record is clear: Bell Atlantic is openly flouting the pricing commitments it made to the Commission and in the process making it economically unfeasible to compete for local exchange service in its region.[6/]

6/ Even if Bell Atlantic ultimately were required to "true-up" its current excessive rates to a TELRIC-based level, it seriously impedes competition every day that these excessive rates remain in effect. These inflated rates prevent potential competitors from selling as many services as they likely would if Bell Atlantic's rates were TELRIC-based, and uncertainty about the existence, size, and timing of any true-up deters current investment. A true-up, if any, would be based only on actual CLEC use of Bell Atlantic network elements and services, not the use foregone.

Bell Atlantic has also blatantly failed to comply with the condition of the *BA-NYNEX Order* which requires it to "negotiate with requesting carriers to establish in interconnection agreements performance standards for network performance" and specified OSS functions, and "to establish enforcement mechanisms to ensure compliance with each performance standard, including private or self-executing remedies." *BA-NYNEX Order* ¶ 182 & Appendix C, Condition 7. As the Commission noted, "without enforcement mechanisms, reporting requirements are 'meaningless.'" *Id.* ¶ 208. Like all the conditions of the BA-NYNEX order, Bell Atlantic is required to "negotiate supplements and amendments to existing interconnection agreements" in order to comply with the condition. *Id.*, Appendix C, Condition 9.

In September 1997, MCI WorldCom presented a comprehensive proposal to Bell Atlantic setting forth performance reporting, standards, and remedies MCI WorldCom requires in order to have a meaningful opportunity to compete in local markets and obtain services of the same quality Bell Atlantic provides to itself and its own customers. This followed several earlier requests from MCI WorldCom to negotiate appropriate performance requirements that had spanned the prior year. *See* Complaint, *MCI Telecommunications Corp.* v. *Bell Atlantic Corp*. File No. E-98-32 (FCC, Mar. 17, 1998) (*"MCI Performance Requirements Complaint")* with attached Declaration of Mark H. Lugar.

Bell Atlantic's response, which came three months later, was grossly deficient, little different from the position that Bell Atlantic took prior to the BA-NYNEX Order and that the *Order* was intended to change. *MCI Performance Requirements Complaint* ¶ 17. Bell Atlantic's proposal included multiple conditions excusing it from complying with any performance requirements, including a laundry list of "delaying events" that excused its performance. *Id.* ¶ 20. None of these conditions was permitted by the *BA-NYNEX Order,* and they defeated the essential purpose of having performance standards with self-executing remedies. *Id.* MCI WorldCom brought the matter to the attention of the Commission, first by way of a meeting with the Chief of the Common Carrier Bureau with Bell Atlantic present, and then through a section 208 complaint when all reasonable means of getting Bell Atlantic to negotiate in good faith had failed. *Id.* ¶¶ 22-28. The Complaint is still pending before the Commission, and MCI WorldCom is still unable to this day to obtain the performance standards that are necessary for it to effectively compete in Bell Atlantic's territory.

Perhaps most outrageous, having induced the Commission to approve its merger with NYNEX by agreeing to conditions incorporated in a Commission order, Bell Atlantic now contends that the Commission lacks authority to enforce its own order. Brief of Bell Atlantic, *MCI Telecommunications Corp. v. Bell Atlantic Corp.*, File No. E-98-32, at 19-20 (FCC filed Oct. 2, 1998) (asserting that Commission lacks jurisdiction to enforce certain merger conditions); Response of Bell Atlantic to MCI's Reply Brief, *MCI Telecommunications Corp. et al. v. Bell Atlantic Corp.*, File No. E-98-32 at 9, (FCC filed Nov. 3, 1998) attached to Motion of Bell Atlantic for Leave to Respond to MCI's Reply Brief (filed Nov. 3, 1998) (same). Bell Atlantic would deny the Commission the power to make its own decision about whether Bell Atlantic is honoring the commitments it made to the Commission to obtain its approval. Bell Atlantic's cavalier bait-and-switch tactics are so atrocious that they bear on Bell Atlantic's fitness. *Cf. BA-NYNEX Order* ¶ 239 (Bell Atlantic's candor bears on its fitness as applicant for transfer of control of Commission license). [7/]

7/ Bell Atlantic is still doling out commitments, this time making the commitments contingent upon Bell Atlantic receiving section 271 authority. *See In re* Pre-Filing Statement of Bell Atlantic New York, *Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the*

GTE's behavior has been no better. GTE has been able to provide interLATA services to its monopoly customers without first complying with the market-opening requirements of section 271. The absence of this incentive to comply has produced predictable results. For example, GTE has maintained that the Act *requires* state commissions to permit GTE to recover its historical costs when pricing unbundled network elements. *See, e.g. MCI v. Pacific Bell,* Case Nos. C97-0670 et al., 1998 U.S. Dist. LEXIS 17556, at *12 (N.D. Cal. Sept. 29, 1998) ("GTE objects to the CPUC's adoption of forward-looking cost models, arguing that the Act requires state commissions to allow for recovery of historical costs.") GTE has even sought to recover its "opportunity costs" in leasing unbundled network elements to CLECs, a position which stands out even in the context of the generally obstructionist tactics that CLECs have been accustomed to from ILECs. *See GTE South Inc. v. Morrison,* 6 F. Supp. 2d 517, 528 (E.D.Va. 1998) ("allowing opportunity costs impedes progress towards greater competition by sustaining GTE's monopoly revenue.").

GTE also intentionally delayed the resolution of interconnection issues between it and CLECs — and thereby delayed local competition in its region and increased the costs of would-be competitors — by filing meritless lawsuits in 16 states challenging state arbitration awards before state commissions reviewed and approved them under section 252(e)(1). Every one of those lawsuits was eventually dismissed on the basis that federal district courts do not have jurisdiction under the Act to hear such cases until a final agreement has been approved by a state commission.

Telecommunications Act of 1996, Case 97-C-021 (N.Y. Pub. Serv. Comm'n, Apr. 6, 1998) (copy available at http://www.dps. state.ny.us).

GTE North Inc. v. McCarty, 978 F. Supp. 827, 836 (N.D. Ind. 1997) (citing 11 of the other cases that were dismissed as premature).[8/]

With local competition in its infancy, the risks from a merger of this size between regional monopolists that, independent of one another, have behaved so poorly in the past cannot be overestimated. The sheer size and reach of a mega-BOC like Bell Atlantic-GTE would give the combined entity enormous power to block competition for local exchange service. Permitting Bell Atlantic and GTE to merge is simply a mandate to raise barriers to the local entry even higher through an entity that would control over one out of every three access lines in this country.

B. The merger does not "enable" Bell Atlantic or GTE to do anything it cannot already do with respect to out-of-region competition, and each will compete out-of-region, including against each other, to the extent it is in its interest to do so.

GTE and Bell Atlantic unabashedly tell the Commission that this extraordinary consolidation of two powerful monopolists is necessary so that these two companies can bring competition to out-of-region local exchange markets and fulfill the promise of the Telecommunications Act of 1996. They have couched the merger in "do or die" terms for the future of the two companies and tell the Commission that the merger "will bring into existence a *fourth* new competitor with the necessary scale and scope" to flourish in an emerging market for bundled services. BA-GTE Appl. 2. All of this will happen only if they are permitted to merge,

---

8/ GTE has also sought to convince state commissions in 21 states that it should be classified as a rural telephone company, thereby exempting it from many of the procompetitive interconnection provisions of the Act. In rejecting GTE's request for such a designation, the Ohio Public Utilities Commission observed that the request "causes us to step back and ponder . . . whether the company is positioning itself to act in an anti-competitive fashion going into the emerging local competitive era." *See, In re GTE North Incorporated's Rural Local Exchange Carrier Exemption Under the Telecommunications Act of 1996*, Opinion, No. 96-612-TP-UNC, 1996 Ohio PUC LEXIS 415, at *4-*5 (Pub. Utils. Comm'n of Ohio rel. June 27, 1996).

however, because "GTE is the 'enabler' that will allow Bell Atlantic to attack other Bell company strongholds across the country." *Id.* 1.

The "enabler" theory is a sham. For new local entrants without a monopoly base, every region is out-of-region, and if CLECs can afford to compete in areas where they do not have a monopoly, then so too can Bell Atlantic and GTE. CLECs, which are much smaller in revenues and profits, have invested substantial sums in order to attempt to enter the local exchange market that companies like GTE and Bell Atlantic are preventing them from entering. As the Commission has found, the capital markets provided billions of dollars of capital for CLECs seeking to enter the marketplace.[9] To the extent that Bell Atlantic or GTE even needs to go to these capital markets, they would be at least as ready a source of financing if they seek to pursue the same strategy as CLECs.

There is simply no plausible evidence that Bell Atlantic or GTE faces an all-or-nothing choice between competing in all major out-of-region markets if the merger is approved versus competing in none without the merger. The chart below sets forth relevant financial data for Bell Atlantic, GTE, other local exchange monopolists, and competitive carriers. By any objective measure, the ability of Bell Atlantic and GTE independently to finance an out-of-region entry strategy cannot be questioned. Each generates from its domestic monopoly profits not available to CLECs. Combined, the merged company would be massive. Indeed, companies with only a

---

9/ *See In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, 13 F.C.C.R. 15280, ¶ 29 (rel. Aug. 7, 1998).

fraction of the cash flow of Bell Atlantic or GTE are already financing aggressive strategies to compete for local exchange service:[10/]

Company	Revenue ($millions) 1997	EBIT ($millions) 1997	Net Income ($millions) 1997
Bell Atlantic	30,193.9	5,341.5	2,454.9
GTE	23,260.0	5,611.0	2,794.0
Merged company:	**53,453.9**	**10,952.5**	**5,248.9**
Ameritech	15,998.0	3,799.0	2,296.0
SBC	24,856.0	3,170.0	1,474.0
Merged company:	40,854.0	6,969.0	3,770.0
Bell South	20,561.0	5,376.0	3,270.0
U S West	10,319.0	2,210.0	1,180.0
AT&T-TCG	51,813.3	6,835.5	4,349.3
MCI WorldCom	27,004.4	1,773.7	592.7
Sprint	14,873.9	2,451.4	952.5
Advanced Radio	1.1	(39.1)	(61.7)
Electric Lightwave	61.1	(34.1)	(33.9)
e.spire (ACSI)	59.0	(82.2)	(115.0)
GST	36.3	(21.8)	(39.6)
ICG	273.4	(180.9)	(327.6)
Intermedia	247.9	(163.5)	(197.3)
McLeod USA	267.9	(69.3)	(79.9)
NextLink	57.6	(102.6)	(129.0)
RCN Corp.	127.3	(60.9)	(49.2)
Teligent	3.3	(135.4)	(138.1)
USN Comm.	47.2	(98.0)	(109.9)
Winstar	79.6	(188.1)	(249.5)

10/ The data in the table is drawn from *QuickSource Fundamental Data & Ratios Reports* (Wall Street Research Net).

Both Bell Atlantic and GTE have the expertise to successfully pursue an out-of-region local strategy independent of the other. These are not neophytes to the local exchange business that must combine their managerial expertise in order to know how to compete in local exchange markets that happen to be out-of-region; these are highly skilled and highly experienced monopolists who have owned local exchange service since the business began. If Bell Atlantic and GTE do not have the expertise to compete out-of-region for local exchange access, no one does.

Bell Atlantic and GTE assert that the merged entity will enter 21 local markets outside its expanded monopoly region. BA-GTE Appl. 6-7. If each really wanted to do so, either GTE or Bell Atlantic individually could finance facilities-based entry into these 21 markets, just as MCI, MFS, and Brooks did individually before their merger to form MCI WorldCom. Even if each company by itself would not enter 21 out-of-region markets, each is likely to enter at least some of the other's monopoly markets. After all, GTE and Bell Atlantic exercise monopoly control over local exchange access in XX of the ten largest local exchange markets in the United States. Thus, even if Bell Atlantic and GTE would not compete in as many out-of region markets on a stand-alone basis (which is far from clear and contrary to GTE's announced intentions pre-merger), GTE would compete in some out-of region markets that would inevitably include at least some Bell Atlantic cities such as New York, Philadelphia, and Washington, D.C. and Bell Atlantic would compete in some out-of-region markets that would inevitably include at least some GTE cities such as Los Angeles, Tampa, and Dallas/Ft. Worth.

Indeed, the Commission — and the shareholders of GTE for that matter — may reasonably ask why GTE suddenly is in need of Bell Atlantic's "anchor customers" (BA-GTE

Appl. 7) to compete out-of-region when the company has stated publicly for over a year that it has firm plans to compete head-to-head out-of-region against the Bell Operating Companies ("BOCs"). *See GTE Annual Report 1997* (Domestic Operations) ("We formed GTE Communications Corporation — which is our competitive local exchange carrier, or CLEC. It will be able to market the full spectrum of GTE services, including local, long-distance, wireless, and data services, without regard to franchise boundaries.").[11/] Indeed, the Chairman of GTE was unequivocal in his message to shareholders in GTE's 1997 Annual Report: "We're confident about GTE's ability to succeed in the competitive marketplace without entering into a major transaction or combination with another company. In other words, we can go it alone and win."[12/] In various statements to its shareholders and the marketplace generally, GTE has made clear that it can afford to compete out-of-region and execute its plans without this merger. See Press Release, *GTE Announces Initiatives to Become a Leading National Provider of Telecommunications Services* (May 6, 1997) ("Simply put, GTE will become a leading national 'one-stop' provider of local, long-distance, Internet and wireless services.");[13/] Indeed, those plans include competing for the business of companies that sound remarkably like Bell Atlantic's "anchor customers." GTE 1997 Annual Report Financial Data ("By packaging products and services, such as traditional wireline, wireless, long-distance and Internet services on one bill,

---

11/ A complete copy of GTE's 1997 annual report (Domestic Operations) is available over the Internet at http://www.gte.com/AboutGTE/annual1997/domestic1.html.

12/ A complete copy of GTE's Chairman's message in the 1997 annual report is available over the Internet at http://www.gte.com/AboutGTE/annual1997/message1.html.

13/ A copy of GTE's May 6, 1997 press release is available over the Internet at http://www.gte.com/AboutGTE/news/050697.html.

GTE is positioned to capture high-value, high margin customers, both inside and outside of franchise territories.").[14]

These statements are confirmed by the size, scope, investments, and profitability of GTE. As of late October 1998, GTE had a market capitalization of nearly $55 billion, and was on track to accumulate nearly $2.8 billion of net income for the year. *See* Prudential Securities, GTE Corp. Company Update (Oct. 27, 1998) (attached hereto as Ex. 3). In the last fiscal quarter, GTE's earnings per share rose 7.6 percent. *Id.* GTE also recently announced that it was planning to sell a small fraction of its local telephone lines as part of its plan to raise $2 billion to $3 billion to invest in faster-growing businesses. See *GTE Plans to Sell 7% Of its Local Phone Lines*, N.Y. Times Nov. 6, 1998 at C5. Contrary to its message to the Commission, GTE is not the undercapitalized "enabler" powerless to execute the same basic strategy that CLECs around the country are pursuing.

Moreover, GTE's national customer base as an Internet provider and also as a long-distance carrier increases both its ability and its incentive to pursue on its own a national strategy to provide a bundle of local, long distance, and Internet services. GTE has over 2.5 million long distance customers — with an addition of over 250,000 in the last fiscal quarter alone — has a 9% market share of the long-distance business in its territories, and long distance customers represent more than 13% of GTE's 19 million domestic switched lines. *See* Merrill Lynch Report, GTE Corporation (Oct. 20, 1998) (Ex. 4). As an Internet provider, GTE Internetworking is the

---

14/ A copy of GTE's Annual Report Financial Data is available over the Internet at http://www.gte.com/AboutGTE/annual1997/finreview2.html#Growth. In support of the merger, GTE now tells the Commission that it intended only to target "small to medium business customers out-of-franchise . . . [and] almost all targeted out-of-franchise customers were located in areas near GTE's local or wireless footprint." Declaration of Jeffrey C. Kissell (attached to BA-GTE Appl.) ("Kissell Aff.") ¶ 3. That is flatly inconsistent with the statements it made prior to announcing the merger.

second largest company in the corporate IP services market with a 17% market share. *Bell Atlantic Merges With GTE: Wild Things are Happening!* Consumer Communications at 11 (Vol. 15, Aug. 1998) (Ex. 5). In addition, GTE Internetworking is one of the four largest high-end dedicated web-hosting providers, with roughly 1000 Web-hosting customers. *Id.* at 12. GTE Internetworking has over 200 points of presence ("POPs") in the United States — the majority of which are located in Bell Atlantic's monopoly region. *Id.* at 13.[15/] In short, GTE does not lack for "anchor customers" or a "robust national brand" that only Bell Atlantic can provide. BA-GTE Appl. 7. GTE is well positioned to compete right now and execute its long-standing plans to take on the BOCs.

In addition, because Bell Atlantic and other BOCs are using their control over the loop and advanced local services to favor their own ISPs (*see* Part III.B below), GTE as a major ISP with a lot of Internet business to lose has an additional incentive to compete locally against all of the BOCs. No one recognizes the importance of GTE's Internet presence to its national strategy better than Bell Atlantic. In proceedings before the Illinois Commerce Commission examining the merger, Bell Atlantic argued that GTE was an attractive partner for Bell Atlantic in Illinois because GTE's Internet backbone network in Illinois meant that "GTE knew Illinois." Transcript of Hearing, *In re Telecommunications Policy Open Meeting,* at 103 (Ill. Commerce Comm'n, Oct. 8, 1998) ("*ICC Hearing*") (relevant excerpts attached as Ex. 6). If indeed GTE's extensive Internet backbone in Illinois makes it a knowledgeable and worthy *partner* in Illinois for Bell Atlantic, then surely GTE is a knowledgeable and worthy *adversary* in New York, Massachusetts,

---

15/ A visual depiction of GTE Internetworking's dedicated PoPs is available over the Internet at http://www.bbn.com/products/maps/us_pop.htm. In addition, both of GTE's critical Network Operations Centers are located squarely in Bell Atlantic territory. See Dedicated Access PoPs, http://www.bbn.com/products/maps/us_pop.htm.

Pennsylvania, the District of Columbia, and all the other Bell Atlantic region states where GTE Internetworking has a substantial presence. *See* Ex. 7 (map of GTE/BBN Dedicated Access POP Network). What GTE is able to "bring to the table" for Bell Atlantic in Illinois (*ICC Hearing* 103), it can equally use against Bell Atlantic in Bell Atlantic's monopoly region.[16]

As for Bell Atlantic, its ability and incentive to compete out-of-region does not change if the merger is consummated. Bell Atlantic insists in its comments that it needs to be a global end-to-end telecommunications provider. BA-GTE Appl. 9 ("a principal motivation for the merger is to enable the combined company to become a truly national provider of bundled services."). But the same factors that would cause a merged Bell Atlantic-GTE to go national therefore would apply to Bell Atlantic alone, and whether Bell Atlantic chooses to adopt that strategy (which it has opted against to this point) does not depend on whether it merges with GTE.

Like GTE, Bell Atlantic is a cash-rich monopoly with enormous independent resources that can implement with ease a strategy that it considers vital to its survival. For the first nine months of 1998, Bell Atlantic had net income of $3.2 billion. See *Bell Atlantic Quarterly Results, Third Quarter 1998.*[17] It has assets of $41 billion and revenues of $27 billion, serves 21 million customers, and monopolizes local service for the headquarters of one-third of the country's

---

16/ As with local and Internet service, GTE and Bell Atlantic do not need to merge in order to compete effectively in the long distance market or to bring the benefits, if any, of additional entry by either or both of them. GTE has quickly built a large and successful long distance business with a 9% market share in its territories and over 2.5 million customers. Merrill Lynch Report, GTE Corporation (Oct. 22, 1998). It added 250,000 customers in the last fiscal quarter alone. *Id.* Bell Atlantic can doubtless do the same without the merger, and is already constructing an extensive long distance network. *See* Press Release, *Bell Atlantic Extends Data Network Capabilities Across U.S.*, Sept. 21, 1998, http:/www.ba.com/nr/1998/Sep/ 19980922001.html.

17/ Bell Atlantic's latest quarterly results are available over the Internet at http://www.bell-atl.com/invest/financial/quarterly/3q98_release.htm.

Fortune 500 companies.[18] It describes itself as "among the world's largest investors in high-growth global communications markets, with operations and investments in 23 countries."[19] The premise of the application that Bell Atlantic needs GTE to "enable" it to compete out-of-region is ridiculous.

Even accepting at face value the demonstrably untrue premise of the application that neither GTE nor Bell Atlantic has the resources or ability to enter all 21 out-of-region markets they claim the merged entity will enter, this does not ameliorate the competitive harm the merger will inflict. Entry by an existing ILEC into another's territory, even on a somewhat more limited scale, would have dramatic competitive effects. Baseman-Kelley Decl. ¶10. For example, GTE's entry into only one city in New Jersey or Maryland would benefit local competition throughout that state and, for that matter, throughout the entire Bell Atlantic region. If an experienced local exchange carrier like GTE demonstrated that Bell Atlantic could improve its OSS, local competition everywhere in the Bell Atlantic region would benefit because Bell Atlantic uses the same OSS region-wide. Similarly, if GTE showed an efficient LEC could provide unbundled loops at a lower price than Bell Atlantic claimed, the cost-based rate for unbundled loops would drop not only in Trenton but in all of New Jersey because of state-wide pricing. In sum, new entrants would be better able to rebut obstructionist arguments of the incumbent if their ranks included another incumbent.

Equally important, GTE's activities in Bell Atlantic's region would facilitate local competition in *GTE*'s region, and Bell Atlantic's activities in GTE's region would facilitate local competition in *Bell Atlantic*'s. CLECs would be able to use in GTE's region the arguments that

---

18/ See http://www.bellatlantic.com/invest/profile/telecom.htm.

19/ See http://www.bellatlantic.com/about/about.htm?homelnav.

GTE made in the Bell Atlantic region to make UNEs and wholesale services available on better terms, and CLECs would be able to use in Bell Atlantic's region the arguments made by GTE to get better terms from GTE. Thus Bell Atlantic's failure to compete in GTE's region impedes competitive entry in Bell Atlantic's region, and vice versa.[20/]

Indeed, given GTE's long-established plans to compete nationwide, it is simply not credible to suggest that GTE will not also compete in Bell Atlantic's Northeast monopoly region, where over 25% of local service revenues are derived in the United States, 23% of access lines are located, and which Bell Atlantic aptly describes as replete with "anchor customers" that can support the national footprint GTE seeks in local. Baseman-Kelley Decl. ¶¶ 29-31. Moreover, GTE already has a significant presence in Bell Atlantic's region through GTE Internetworking, and GTE can also market local services to this established corporate customer base.

Furthermore, according to Bell Atlantic-GTE's own "enabler" theory, GTE has the ability and incentive to compete against Bell Atlantic in local markets near GTE's territories in Virginia and Pennsylvania. The "enabler" theory, which posits that GTE's existing territories would enable Bell Atlantic to compete against other ILECs with adjacent franchises, applies equally well to establish that GTE is well-situated to compete against Bell Atlantic. That is undoubtedly why the applicants have gone to great extremes to downplay GTE's existing interconnection agreements with Bell Atlantic in Virginia and Pennsylvania, characterizing them as "essentially pro forma interconnection agreements" and arguing that GTE's plans to enter Bell Atlantic's local service markets are "exceedingly limited." BA-GTE Appl. 30.

20/ The fact that out-of-region competition may jeopardize its in-region monopoly may explain Bell Atlantic's decision not to compete out-of-region to date. However, if Bell Atlantic is willing to take this risk collectively with GTE, it would be willing to take the risk individually.

Tellingly, however, the GTE affiant who discusses GTE's pre-merger CLEC strategy, Jeffrey Kissell, is utterly *silent* on the nature of GTE's plans to compete against Bell Atlantic in Virginia and Pennsylvania. *See generally* Kissell Aff. Indeed, no GTE witness offers testimony under oath about GTE's specific plans to compete in Virginia and Pennsylvania anywhere in the application to transfer control, despite the importance of this issue to the Commission's review of the merger. Instead, sworn testimony about competition in Virginia and Pennsylvania comes only from Bell Atlantic's affiants, who exclusively discuss Bell Atlantic's plans to enter GTE's territories in Pennsylvania and Virginia, not vice versa. And one of these witnesses acknowledges that state-wide advertising of Bell Atlantic in Pennsylvania could have a "spill-over" effect in GTE's territories, although this is purported to relate only to long distance service because "there is no consideration of marketing" local or bundled services to these customers. Declaration of Daniel J. Whelan, ¶ 6 (attached to BA-GTE Appl.) ("Whelan Aff").

In proceedings concerning the MCI WorldCom merger less than five months ago, one of GTE's affiants in this proceeding, Debra Covey, testified that with the benefit of its operations in Pennsylvania, GTE intends to offer local telephone service in Bell Atlantic's region in West Virginia. *See* Transcript of Proceedings, *WorldCom, Inc., Petition for Consent and Approval to Acquire All Outstanding Shares of Stock of MCI Communications Corporation*, Case No. 92-0347-SWF-CN, at 119-20 (Publ Serv. Comm'n of W. Va. June 25, 1998) (excerpts attached as Ex. 8) ("GTE Communications Corporation, our C-LEC, which I am employed by, intends to offer local service here [in West Virginia] next year" and "as a C-LE[C] we will offer bundled services, wireless paging, [I]nternet, local"); *id.* at 124 (GTE intends to compete in 100-200 mile radius from existing territories). If GTE intended without the merger to compete to provide local and bundled services in West Virginia with its dispersed population centers, rather modest large customer base, and lack of immediate proximity to other GTE territories, surely it would compete in New York, Philadelphia, and Washington, D.C. which possess the "large, lucrative business customers" which Bell Atlantic and GTE now maintain are the "opportunity worth considering" in the CLEC business. *See* Whelan Aff. ¶ 5.

If Bell Atlantic is indeed serious about entering local markets out-of-region, it will compete in the major markets that GTE serves as well as those served by other ILECs. If Bell Atlantic were truly interested in breaching the ILECs' current non-aggression pact, it also would likely compete in GTE's monopoly territories in Pennsylvania and Virginia contiguous to Bell Atlantic. As Bell Atlantic itself acknowledges, Bell Atlantic's advertising in Pennsylvania already reaches GTE territory. Whelan Aff. ¶ 6. Thus, Bell Atlantic has name recognition and a cost advantage in competing there. It is therefore the most likely ILEC competitor against GTE. The merger will prevent the significant impact that Bell Atlantic's entry would have in those monopoly regions.

As the Commission has recognized, "[i]n telecommunications markets that are virtual monopolies or that are not yet developed, . . . the loss of even one significant market participant can adversely affect the development of competition and the attendant proposals for deregulation." *BA-NYNEX Order* ¶ 66; Baseman-Kelley Decl ¶¶ 33-36 . The Commission includes as a significant market participant an ILEC that is reasonably likely to enter another ILEC's territory. *BA-NYNEX Order* ¶¶ 72-73. Because of GTE's pre-merger plans to compete out-of region, and because of Bell Atlantic's and GTE's own statements about the imperative to compete out-of-region, the evidence strongly suggests that they will compete head-to-head against one another in at least some markets if they do not merge, and because the competitive pressures on each of them to compete out-of-region are likely to increase as local competition grows, each of the companies should be treated as a likely potential significant market participant in the other's markets. Baseman-Kelley ¶¶ 33-36 . The loss of a potential significant market participant will harm competition for local exchange access in each of the regions because it will "(1) increase firms' ability to exercise market power unilaterally in the market for local mass market services . . . ; (2) increase firms' ability to exercise market power unilaterally in the market for bundled local and interexchange services . . . ; (3) increase the likelihood that firms will exercise market power through coordinated interaction; and (4) adversely affect the dynamic development of competition in both local and bundled markets . . . ." *BA-NYNEX Order* ¶ 100.

The proposed merger would therefore reduce competition in both regions by eliminating GTE as an independent entrant into Bell Atlantic's region and Bell Atlantic as an independent entrant into GTE's region.

C. The merger will reduce local competition in Bell Atlantic's and GTE's regions.

Bell Atlantic's and GTE's strategy is most assuredly not a plan to bring local competition to out-of-region local markets. Instead, it is a strategy to take advantage of the current *lack* of local competition in in-region markets order to raise even higher barriers to local entry and lock up a critical group of local customers — large business customers that account for a disproportionate share of all local traffic, revenues, and profits and that have multiple locations concentrated in Bell Atlantic's and/or GTE's regions. Bell Atlantic's and GTE's goal is to preempt local competition within their regions, not to promote it outside them.

Bell Atlantic and GTE have made clear to the Commission that the critical goal of their merger is to achieve "the national coverage [which] will allow the combined company to compete more effectively for the business of a host of firms that have offices both in Bell Atlantic's region and near to GTE's franchise areas across the rest of the country." BA-GTE Appl. 13. Indeed, their main goal is to "utilize Bell Atlantic's existing relationships with these customers to sell through to their subsidiaries or affiliates in *selected out-of-franchise locations*." Kissell Aff. ¶ 7 (emphasis added). Stripped of the rhetoric, Bell Atlantic and GTE's plan to "attack other Bell company strongholds" (BA-GTE Appl. 1) is in fact a strategy to selectively serve the out-of-region locations of its largest in-region customers.

As a result of the merger, Bell Atlantic-GTE would be able to offer business customers facilities-based local service at all of their locations where Bell Atlantic-GTE is the incumbent with a ubiquitous network. Bell Atlantic and GTE correctly recognize that there is a demand for "national local" or "regional local" service: some large businesses that have multiple locations prefer to purchase local and long-distance service from a single source. BA-GTE Appl. 7-8. Equally important, they plan to rely heavily on their own facilities because carriers that are able to meet this demand using their own facilities will have a significant competitive advantage. The applicants also recognize that resale is not a viable strategy, and BA-GTE's "enabler" strategy will work best if it can take advantage of GTE's facilities in its monopoly "islands." Kissell Aff. ¶ 5; see also Baseman-Kelley Aff. at ¶¶ 61-62 . These sophisticated business customers understand that a CLEC that is dependent on a competing ILEC for critical inputs will not be able to assure as high-quality and reliable service as it could if it is exclusively facilities-based. The higher the percentage of locations of a multi-location customer to which a LEC is able to provide local services exclusively over its own facilities, the greater its competitive advantage.

The merger would enable Bell Atlantic and GTE to meet this demand for facilities-based national service not, as CLECs do, by investment alone, but by consolidating their ubiquitous monopoly networks. Bell Atlantic-GTE's advantage would be especially great in marketing to customers with all or most of their locations in the Bell Atlantic-GTE region, and that category is likely to include companies headquartered in the Bell Atlantic-GTE region, where decisions concerning the telecommunications needs of a particular company are typically made. See BA-GTE Appl. 13 ("the national coverage will allow the combined company to compete more effectively for the business of a host of firms that have offices both in Bell Atlantic's region and near to GTE's franchise areas."). The fact that a third of all the nation's lines are in Bell Atlantic's and GTE's regions virtually guarantees the combined company a disproportionate advantage. To the extent that customers headquartered in its combined region have locations distributed more evenly throughout the United States, Bell Atlantic-GTE still could offer, and Bell Atlantic and GTE individually already do offer, facilities-based service at one-third of their locations. Baseman-Kelley Decl. ¶ 29. Because a smaller portion of the country will be out-of-region after the proposed merger, the amount of investment needed to achieve control over the facilities used to serve any given percentage of locations is smaller for the merged firm than for each firm alone. *Id.* ¶ 64.

Of course, the amount of investment that Bell Atlantic-GTE would need to serve all or most of the out-of-region locations of large businesses headquartered in its region will be substantially less than the investment required by CLECs to provide facilities-based local service to these customers at all of their in-region and out-of-region locations. *Id.* ¶ . Given the limited geographic reach of CLEC networks even in markets where they have facilities, these networks may not serve even all of the locations of these companies in those markets where CLECs have a presence. By combining the monopoly facilities that serve a high percentage of these locations, the merger would reduce Bell Atlantic-GTE's dependence on gaining affordable and nondiscriminatory recourse to access and resale services from out-of-region ILECs. However, the dependence of CLECs on out-of-region ILECs will be undiminished, and their dependence on Bell Atlantic and GTE in multiple locations would be increased by the merger.

The end result is that the merger would make it harder for CLECs to compete with Bell Atlantic-GTE to provide facilities-based local service at all or most of the locations of businesses headquartered in Bell Atlantic-GTE's region. A CLEC that seeks to compete with Bell Atlantic-GTE for multi-location business must convince a large business customer to change its local provider in 100% of its locations or convince the customer to use multiple providers. On the other hand, in many cases Bell Atlantic-GTE will already be serving all or most of the customer's locations as a result of its geographic reach and monopoly control over one-third of the lines in the country, and therefore little to no change in providers will be required.

Thus, the true impact of the merger to Bell Atlantic and GTE is that it will significantly increase the percentage of locations of national or, more likely, regional businesses that Bell Atlantic and GTE *already* serve using their own monopoly local facilities. Without any out-of-region investment, Bell Atlantic and GTE will make themselves the primary facilities-based provider of these customers' company-wide needs for local telephone service. This includes the one-third of Fortune 500 companies currently headquartered in Bell Atlantic's region alone, as well as the federal government. *See* Bell Atlantic 1997 Annual Report (the Bell Atlantic "region includes 34% of Fortune 500 companies and Federal government.").[21/] Any advantage in serving these customers is important because these "regional local" customers generate a disproportionate share of local exchange and exchange access revenues and profits — which is precisely why Bell Atlantic and GTE are looking to lock them in as customers for the long haul.

21/ A copy of Bell Atlantic's 1997 annual report is available over the Internet at http://www.bell-atl.com/invest/financial.annual97/glance.htm.

By combining their ubiquitous monopoly regions, Bell Atlantic and GTE are seeking to leverage their overwhelming monopoly control of facilities in their own regions to lock up these customers once and for all. Far from promoting competition that purportedly would otherwise not take place in out-of-region markets, Bell Atlantic-GTE's merger stifles competition within their own regions for their most profitable customers. The fuzzy promise of out-of-region competition is the headline, but consolidation of control over customers within its own region is the story of this merger.

By making it harder for CLECs to compete for large business customers, the merger will decrease competition not only for these customers but for *all* local customers. MCI WorldCom's goal, like that of many CLECs, is to compete not only for the local business of large business customers, but also for the business of residential and small business consumers. Many CLEC local facilities support service to both large and small customers, and if CLECs' ability to compete for key business customers is artificially reduced by the proposed merger, the economic justification for investments in facilities that serve all types of customers will be undermined. Shrinking the available market for CLECs by locking up key business customers will increase barriers to entry into the market as a whole and decrease the ability of a CLEC to compete for *any* customer within the combined region. Baseman-Kelley Decl. ¶¶ 77-84. Bell Atlantic-GTE's merger-created competitive advantage will inevitably reduce competition for all types of customers in local markets throughout their regions.[22]

22/ The problem would be compounded if Bell Atlantic and GTE were allowed to provide in-region long-distance services while they continue to monopolize local exchange and exchange access services. Baseman-Kelley Decl. ¶ 42-56. The profitability of CLEC entry into local exchange service is significantly affected by the ability to compete to provide exchange access. Id. If Bell Atlantic-GTE gains a significant share of in-region long distance traffic by locking up major business customers that constitute a critical portion of the total local customer base, the market available to CLECs would shrink significantly because Bell Atlantic-GTE's long-distance

D. The merger increases the potential for coordinated interaction among the few remaining BOCs in the post-merger market.

As the Commission has found, "[m]arket performance can also be adversely affected if a merger increases the potential for coordinated interaction by firms remaining in the post-merger market." *BA-NYNEX Order* ¶ 121. Coordinated interaction occurs when a group of firms engages in conduct that is profitable to each of them because of the accommodating reactions of all the others. *Id.* The probability of coordinated interaction increases as "the number of most significant market participants decreases" because "the remaining firms are increasingly able to arrive at mutually beneficial market equilibria, to the detriment of consumers." *Id.* Coordinated interaction can be accomplished more easily with fewer firms because the remaining firms will cheat on each other less (because they have less incentive to do so as there are fewer customers to win), are able to detect deviations from coordinated conduct more easily, and can effectively punish deviation through coordinated retaliation. *Id.*

The proposed Bell Atlantic-GTE merger alone would significantly increase the likelihood of coordinated interaction. It will make it much easier and more likely for the few remaining major ILECs to continue the non-aggression pact under which they do not compete in each other's regions.

Although approval of one of the pending BOC mergers does not necessarily mean that the Commission should approve the other, all of these effects would be compounded if the Commission permitted both the Bell Atlantic-GTE and the SBC-Ameritech mergers to proceed. Baseman-Kelley Decl. ¶¶ 29-31. Indeed, approving the pending Bell Atlantic-GTE merger along with the pending SBC-Ameritech merger would be tantamount to carving most of the United

---

customers would likely buy access from it, not from CLECs. A contracted market will make it harder for CLECs to justify investment in wide-scale local networks, and that could mean less competition, or delayed competition, for all classes of customers. *Id.*

States into two huge regions each controlled by a single monopolist — "Bell West" consisting of SBC-Ameritech-SNET-PacBell primarily in the Midwest, Southwest, and West, and "Bell East" consisting of Bell Atlantic-GTE-NYNEX primarily in the East. The two combined entities would control almost 70 percent of local exchange revenues in the United States. *Id.* ¶ 29. The mergers would put two-thirds of the country's access lines into the hands of two monopolists who have steadfastly resisted at every turn any progress toward local exchange competition in this country since the Telecommunications Act was passed almost thee years ago. These two monopolists would together dominate the provision of local telephone service in this country, and possibly dominate bundled local and long-distance service as well in their respective regions — which is precisely the purpose of Bell Atlantic's and GTE's strategy. *See* BA-GTE Appl. 9.

If the two pending mega-mergers were allowed to proceed, it would be easier for the few remaining ILECs to reach mutually beneficial understandings to limit competition by serving out-of region locations only of customers predominantly located in their region. For example, Bell Atlantic-GTE would concentrate on the large business customers headquartered in its region, and SBC-Ameritech would concentrate on the large business customers headquartered in its region. The two proposed mega-BOC mergers together threaten to carve up the United States primarily between two local exchange monopolies of relatively equal size, and it is highly unlikely that either of these two mega-BOCs would have an incentive to compete for customers that are primarily located in the other one's region. The mergers would reduce the likelihood that out-of-region competition by one company would cause the other to respond, and by not responding, both companies would be better off than they would otherwise be. A tacit understanding whereby the two mega-BOCs focus only on businesses located primarily in their particular region would be the likely outcome. And even in the unlikely event that the two mega-BOCs chose to compete at the margins against one another at some indeterminate time in the future, this still would not counterbalance the enormous anti-competitive effects felt in each of their regions now as a result of allowing them to merge in the first instance.

E. The Bell Atlantic-GTE merger, with or without the SBC-Ameritech merger, reduces the ability of regulators and competitors to benchmark.

In the *BA-NYNEX Order*, the Commission carefully analyzed the importance of benchmarking to its ability to combat abuse of market power in the local exchange market, and concluded that mergers of major ILECs seriously threatened the ability to benchmark. *See BA-NYNEX Order* ¶¶ 147-156.[23/] Although the Commission allowed Bell Atlantic to acquire NYNEX notwithstanding this prospect, the Commission should not allow Bell Atlantic to harm benchmarking even further. The Commission should draw the line at the Bell Atlantic-GTE merger (as well as at the pending SBC-Ameritech merger).

The importance of benchmarking is clear. Benchmarking allows the Commission "to ensure just and reasonable rates, constrain market power, [and] establish and enforce the pro-competition rules necessary to achieve competition and deregulation." *BA-NYNEX Order* ¶ 156. The Commission uses benchmarking in a wide variety of contexts.[24/] As the Commission has

---

23/ "Benchmarking is the review of performance data from several entities and use of the 'best' performance as the principal criterion for comparing entity performance." *In re Policy and Rules Concerning Rates for Dominant Carriers*, Memorandum Opinion and Order, 12 F.C.C.R. 8115, ¶ 57 (1997) ("Rates for Dominant Carriers").

24/ The Commission, for example, relied on benchmarking to assess the reasonableness of individual LECs' physical collocation tariffs. *See In re Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport,* Second Report and Order, 12 F.C.C.R. 18730, ¶¶ 143, 146 (1997). Similarly, the Commission has termed benchmarking "not only desirable but indispensable" in price cap regulation. *See In re Policy and Rules Concerning Rates for Dominant Carriers,* Memorandum Opinion and Order, 8 F.C.C.R. 7474, ¶ 8 (1993). As the Commission has noted, benchmarking has been a "primary goal" of certain of the Commission's regulatory efforts.

recognized, the use of benchmarking is broadly recognized and embraced: "Aside from the DOJ and the courts, the Bell Companies themselves have emphasized the importance of benchmarks, and especially seven benchmarks, as an important regulatory tool." *BA-NYNEX Order* ¶ 149 (citing Bell Atlantic support for benchmarking). In allowing the Bell Atlantic-NYNEX merger, the Commission expressly cautioned against further consolidation:

> Further reductions . . . become more and more problematic as the potential for coordinated behavior increases and the impact of individual company actions on our aggregate measures of the industry's performance grows. . . . [A]lthough we do not find the reduction in major incumbent LECs caused by the proposed [Bell Atlantic-NYNEX] merger sufficient to render it against the public interest, further reductions in the number of Bell Companies or comparable incumbent LECs would present serious public interest concerns.

Id. ¶ 156.

In seeking approval of its merger with NYNEX, Bell Atlantic reassured the Commission that after that merger there would still be "5 RBOCs, GTE, SNET" (in addition to smaller companies). *Id.* ¶ 155. Of those seven, however, only four would remain if this round of consolidation is allowed to proceed.[25/] Of the nine largest ILECs when the 1996 Act was passed, fewer than half would remain. This is exactly the "further reduction" that the Commission indicated would "present serious public interest concerns." *Id.* ¶ 156.

Even without the proposed SBC-Ameritech merger, the Bell Atlantic-GTE merger would reduce the Commission's ability to meaningfully benchmark the performance of the ILECs. Simply put, there would be too few incumbent LECs left to provide meaningful comparisons. As with SBC-Ameritech, moreover, the sheer size of a Bell Atlantic-NYNEX-GTE conglomerate

---

25/ Having eliminated NYNEX, Bell Atlantic seeks to eliminate GTE as an independent ILEC. After consuming Pacific and SNET, SBC is proposing to consume Ameritech.

alone would reduce the value of certain of the Commission's benchmarking calculations. *See BA-NYNEX* ¶ 150 (discussing impact of size of ILEC on "X Factor" calculation).[26/]

Beyond the need for benchmarking by the Commission and state regulators, customers and competitors of the ILECs also heavily rely on the ability to compare and benchmark the offers and actions of the LECs. *See* Joint Declaration of Marcel Henry and John Trofimuk, ¶¶ 5-7 (attached as Ex. 2) ("Henry-Trofimuk Decl."). If in business negotiations an ILEC asserts that a particular service is not feasible or must be structured or priced in a particular manner, a customer (or competitor) can point to the contrary position of a different ILEC to demonstrate that a more reasonable approach is possible. *Id.* As the number of major ILECs is reduced from 9, 8, or 7 down to 4, 3, or even 2, the ability to compare and contrast service offerings will be greatly diminished. *Id.* ¶ 7. This day-to-day benchmarking occurs all the time, and is gravely threatened by the merger proposals now pending before the Commission.

Benchmarking — by regulators, customers, and competitors — is at least as important in the area of local competition as in other contexts. Today, ILECs engage in a wide variety of abusive practices intended to preclude local competition, but different ILECs use different anticompetitive tactics. The current number of remaining ILECs gives the Commission and state commissions at least some reasonable opportunity to assess differing positions on issues both large and small — and to select the approach that best advances the goals of competition.

26/ The size of the merged entity would also increase its ability to dominate the standards-setting process and to establish *de facto* standards that advantage itself and disadvantage potential competitors. *See* Baseman-Kelley Decl.¶ 40. Both incumbent and competitive LECs need standards in order to be able to interconnect their networks reliably and efficiently. An ILEC like Bell Atlantic-GTE — controlling one-third of the access lines in the country — would have even greater influence in the standards-setting process and, by virtue of its size, would be able to dictate standards that were in its interest. This distortion of the standards setting process would, in turn, further compromise the Commission's ability to benchmark the actions and offerings of the different ILECs.

An important example of policy differences between Bell Atlantic and GTE involves compensation for exchange of local traffic between ILECs and CLECs. GTE agreed to the approach advocated by MCI – a "bill and keep" system under which both sides receive and complete local calls intended for their subscribers, without any exchange of money. In contrast, Bell Atlantic rejected a bill and keep approach in favor of a system of reciprocal compensation. *See* Henry-Trofimuk Decl. ¶¶ 8-10. At a minimum, the different approaches of GTE and Bell Atlantic provide information about the practical effects of the two approaches so that competitors and regulators can evaluate which system is best.[27/]

An example of benchmarking on the operational side involves systems to receive, track and process "trouble tickets" reporting problems in an ILEC's provision of local interconnection and access to CLECs like MCI WorldCom. Bell Atlantic performs this function electronically, but GTE does not. By forcing CLECs to use the telephone to reach GTE's operations department to report and seek a resolution of a problem, GTE's manual system leads to delays and inefficiencies. *See id.* ¶¶ 11-12.

In addition, Bell Atlantic provides a significantly lower level of account team support to MCI WorldCom than does GTE. Henry-Trofimuk Decl. ¶¶ 16-17.[28/] The account team is involved in most aspects of the relationship between the two carriers, and fewer account team members generally means lower levels of service. *Id.* Nevertheless, although MCI WorldCom's

---

27/ Notwithstanding Bell Atlantic's preference for reciprocal compensation, however, Bell Atlantic has subsequently refused to pay the required compensation for local traffic that MCI WorldCom terminates to ISPs, and MCI WorldCom has been forced to obtain orders from state commissions requiring Bell Atlantic to comply with its obligations. *See id.* ¶ 9.

28/ Moreover, Bell Atlantic refuses to allow MCI WorldCom to interact with one account team on all issues, but insists that MCI contact different support staff on different types of issues. On issues relating to MCI WorldCom's efforts to compete as a CLEC, Bell Atlantic allocates, for its entire region, a grand total of *three* individuals to work with MCI WorldCom. *See id.* ¶¶ 14-15.

business with a merged Bell Atlantic-GTE would be even greater than its current business with either company separately, Bell Atlantic has indicated to GTE that the merged company would reduce the level of staffing provided to support its business relationship with MCI WorldCom. *Id.* ¶ 17.

This type of "lowest common denominator" approach would likely be used in a wide variety of operational and policy contexts. The merger would necessarily eliminate the existing diversity of approaches to important competitive issues affecting competition. Given the ILECs' interest in preventing effective local competition from emerging, the likely result of the proposed merger is that customers and competitors such as MCI WorldCom would be left with the worst of both companies' policies and practices.

Thus, permitting the proposed merger to proceed would cause the Commission to lose an important tool to nurture local competition and control the abuse of monopoly power. Customers and competitors such as MCI WorldCom would lose the ability to compare the performance of different ILECs. The few remaining major ILECs would be all the more able to exclude competition and abuse their dominant position in the local exchange market. Continued consolidation of ILECs if all pending and likely future proposed mergers are approved would make benchmarking virtually impossible, just as it was with the old Bell System when all of the BOCs were under common ownership and other ILECs followed their lead.

F. The merger would increase Bell Atlantic's and GTE's ability to exercise market power over interLATA telecommunications services if they obtain section 271 authority while their bottleneck remains intact.

Another significant threat to competition posed by this merger involves the long distance market if Bell Atlantic gains authority under section 271 to provide interLATA telecommunications services within its region while it continues to possess bottleneck control over local exchange and exchange access services.[29] In these circumstances, the merger likely would facilitate Bell Atlantic-GTE's ability to achieve significant market power in the market for long distance telecommunications services. Baseman-Kelley Decl. ¶¶ 42-55 .

The proposed merger would enhance Bell Atlantic's and GTE's ability to engage in anticompetitive price squeezes because it would enable them to engage in price discrimination on both ends of more calls. The Commission has recognized that BOCs have the ability to undermine competition by "squeezing" the differential between the price of interstate exchange access services purchased by competitors and the retail price of long distance service offered by the ILEC to its customers. *See BA-NYNEX Order* ¶¶ 115-117. The price squeeze is accomplished by setting a "high" price for access services and a "low" price for retail long distance services. Baseman-Kelley Decl.¶¶ 42-55. By expanding Bell Atlantic's and GTE's regions, the merger would cause a higher percentage of calls to both originate and terminate in-region.[30] Bell Atlantic-GTE's artificial advantage resulting from inflated access charges is greater for calls that begin and end within its region. By using its own ubiquitous facilities for access within its expanded region, Bell Atlantic-GTE would get access at its economic cost at both the originating and terminating ends (notwithstanding any nominal internal transfer price), but unaffiliated competitors would pay the inflated rate. *Id.* ¶ 43. Through a variety of strategies, Bell

---

29/ As discussed in Section IV.B. below, a combined Bell Atlantic-GTE cannot legally provide interLATA long distance service to customers anywhere in the current Bell Atlantic region. Accordingly, following consummation of this merger, GTE will have to cease providing long distance service to customers in Virginia, Pennsylvania, and anywhere else in the current Bell Atlantic region where Bell Atlantic has not received section 271 authority.

30/ Indeed, at an Illinois Commerce Commission hearing reviewing the merger, testimony was offered by Sprint indicating that the merger will result in 42% of interLATA traffic for customers of Bell Atlantic and GTE being in-region after the merger. *ICC Hearing* 118.

Atlantic-GTE could undercut the long distance prices of its competitors even though it is no more efficient. *Id.* ¶¶ 42-55.

The Commission concluded that it could approve a merger that facilitated "price-squeezing" tactics if the tactics were addressed by "adequate safeguards against such conduct," including requiring that "interconnection and unbundled network elements ("UNEs") are available at rates based on the economic costs of providing such services and facilities." *BA-NYNEX Order* ¶ 117. Bell Atlantic has failed to deploy OSS that make UNEs commercially available and has flouted its commitment embodied in the *BA-NYNEX Order* to offer TELRIC rates, and GTE has been no better. *See* Section I.A above. The failure of any nominal "safeguards" is reflected in the general absence of local exchange and exchange access competition that resulted.

The ability to engage in less detectable and more significant non-price discrimination is also significantly enhanced by the merger. Baseman-Kelley Decl. ¶¶ 56-58. Although the Commission did not find that Bell Atlantic's previous merger with NYNEX significantly enhanced the likelihood of anticompetitive effects of non-price discrimination by the merging ILECs, *see BA-NYNEX Order* ¶ 120, here the issue involves a much higher concentration of access lines under common ownership — one-third of all access lines in the entire country — than was at issue in the Bell Atlantic-NYNEX merger. Thus, interexchange carriers will be more dependent on a single entity for access exchange than they would be absent the merger. This would make hard-to-detect methods of non-price discrimination even more crippling to competing long-distance companies. Common ownership facilitates Bell Atlantic's and GTE's ability to focus their non-price discrimination efforts across the two regions.[31/]

31/ The Bell Atlantic-GTE merger increases the risk of harm to long distance competition from another potential anticompetitive practice — "grooming" international traffic inbound to the United States. The Commission recently requested comments on whether grooming arrangements between foreign carriers with market power in their home market and ILECs

III. BY SIGNIFICANTLY INCREASING THE PERCENTAGE OF INTERNET USERS AND TRAFFIC OVER WHICH BELL ATLANTIC AND GTE WOULD HAVE BOTTLENECK POWER, THE PROPOSED MERGER THREATENS COMPETITION IN INTERNET SERVICES.

As with the proposed SBC-Ameritech merger, the application of Bell Atlantic and GTE to merge raises serious concerns about the ability of the merged company to exploit its bottleneck monopoly to endanger competition among ISPs and threaten higher prices for Internet users and content providers. Both mergers raise similar threats to competition on the Internet, and for both the Commission must carefully weigh the ability of an ILEC to steer customers to the ILEC's affiliated ISP and the resulting impact of the merger on Internet competition. The risk of bottleneck exploitation and market dominance is even greater with the Bell Atlantic-GTE proposal, because GTE's ISP (formerly BBN Planet) already holds a leading position in the Internet marketplace. After merger, Bell Atlantic-GTE would be well on its way to market power enhanced by anticompetitive means.

An ISP with a large and disproportionate share of Internet traffic from customers that are effectively locked into its service may be able to exercise market power. Internet users, including consumers and content providers, demand that their ISPs provide universal connectivity — the ability to exchange Internet traffic with any other Internet user. When one ISP controls access to

---

present a potential for anticompetitive effects and on how that risk could be reduced. *See In re 1998 Biennial Regulatory Review - - Review of the International Settlements Policy and Associated Filing Requirements*, Notice of Proposed Rulemaking, 13 F.C.C.R. 15320, ¶ 43 (rel. Aug. 6, 1998). The Commission should indeed be concerned about grooming arrangements between a dominant foreign carrier and an ILEC. An ILEC's monopoly control over the local access and exchange markets enables it to negotiate more favorable arrangements to terminate U.S. inbound traffic with dominant foreign carriers that increase the cost of competing U.S. carriers. For example, an ILEC may seek to groom inbound traffic geographically to increase the proportion of low-cost traffic it receives from a foreign correspondent, and the result is to shift high-cost traffic to competitors and thereby undermine their ability to compete. The combination of Bell Atlantic and GTE increases the risks and anticompetitive effects because extending their combined monopoly power over an even greater portion of the United States makes the merged entity an even more attractive grooming partner than the two ILECs standing alone.

a greater percentage of Internet customers than other ISPs, loss of connectivity to the larger ISP may hurt the smaller ISPs more than loss of connectivity to any of the smaller ISPs would hurt the larger ISP. Any resulting inequality in bargaining power may enable the larger ISP to impose a deal in which smaller ISPs pay it more (on a per-unit basis) to terminate their traffic than the larger ISP pays them to terminate its traffic.[32/] As a result, the larger ISP may be able to increase the costs of rivals that are no less efficient or innovative, and the consequence for consumers would be higher prices for Internet services. If the larger ISP becomes big enough and reaches a critical mass, a tipping effect may occur that enables it to wield spiraling power over Internet services. Baseman-Kelley Decl. ¶¶ 90-104.

Both Bell Atlantic and GTE operate ISPs,[33/] and the combination of GTE Internetworking with Bell Atlantic.net would make the Internet business a major element of the merged company that they would want to grow even faster.[34/] Not content to compete strictly on the merits of the ISP services, Bell Atlantic in particular is already pursuing two anticompetitive strategies to leverage its local bottleneck power in order to increase their Internet business. *First*, Bell Atlantic is taking advantage of the popularity of advanced high-speed local services like xDSL to tie its Internet services to its local services. If the promise of these services is realized and they become the predominant form of access to the Internet, these tying arrangements will enable a merged Bell Atlantic-GTE to capture a predominant share of Internet business within their regions.

32/ Whether in the form of peering arrangements or contracts for purchase of dedicated or dial-up access, agreements between ISPS for the exchange of Internet traffic are unregulated.

33/ As explained below, Bell Atlantic is today violating section 271 by providing Internet services, which are prohibited interLATA information services. *See* Part IV.C below.

34/ Certainly the merger does not *enhance* competition in Internet service markets (which, except at the local bottleneck, are already very competitive).

Second, Bell Atlantic and GTE are trying to increase the costs of competing ISPs by making them pay exorbitant prices for the calls that they receive from their customers. Even though the cost of completing a call to an ISP is no greater than the cost of any local call, ILECs want ISPs to pay them inflated access charges applicable to interstate calls. Because an ILEC's ISP (whether integrated with the ILEC or a nominally separate affiliate) will pay only the economic cost of access, it will have an artificial advantage that enables it to capture Internet business even if it is less efficient and less innovative than its competitors.

The combined company's ISPs may have the critical mass of Internet traffic that permits it to skew Internet competition in its favor. The anticompetitive strategies that Bell Atlantic is currently pursuing to exploit bottleneck control over the "last mile" will give the merged company more Internet business than it would earn through fair competition. The merger could therefore enable Bell Atlantic-GTE to increase its Internet business to the point that, either individually or with other mega-BOCs, it could achieve market power, for example, by forcing other ISPs to accept asymmetric interconnection agreements. Because Bell Atlantic and GTE would (like SBC and Ameritech) have bottleneck control over one-third of the access lines in the country, these "mega-BOCs" could gain significant market power over the development of the Internet.

A. BA-GTE could leverage its bottleneck control over local services, especially advanced high-bandwidth services, to acquire enough Internet traffic to exercise market power through coordinated interaction with other mega-BOCs.

Virtually all traffic between end users and ISPs in their regions must go through the networks of Bell Atlantic and GTE, whether through analog modem dial-up, ISDN, or dedicated access such as T-1s and fractional T-1s. Internet users and content providers are almost wholly dependent on reaching the Internet through Bell Atlantic's and GTE's monopoly local networks. Although ISPs that provide Internet connectivity between local networks lack any bottleneck power and compete intensely,[35] the ILECs exercise bottleneck control of the local Internet connections of end users and content providers. The current lack of local competition leaves Internet users with no choice but to use the ILEC's local network to reach the ISP of the user's choice.

That is true for advanced services like xDSL as well as more traditional methods of access to the Internet. With the advent of advanced high-bandwidth data services such as xDSL that are particularly attractive to Internet users, an ILEC's ability to affect Internet traffic to and from captive customers within its region will become even greater. The Commission has focused on xDSL services because of their potential to make high-speed access to Internet services more broadly and cost-effectively available.[36] Digital Subscriber Line ("DSL") technology runs over existing copper telephone wires, and provides transmission speeds dramatically higher than other commonly available options.[37] Although there has long been the promise of high speed digital

35/ No interLATA backbone provider has bottleneck control over any customer. Even a company with 50% of that business would not have anything approaching the kind of control over its customers that any ILEC has over its customers. ISPs and end users can choose among several operators of national backbone networks — including GTE — and no ISP or end user is locked into obtaining backbone service from its current provider because all retail and wholesale backbone customers can switch Internet backbone providers with relative ease. *See* Joint Reply of WorldCom, Inc. and MCI Communications Corporation to Petitions to Deny and Comments, *In re Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211 at 74, 78-80 (FCC filed Jan. 26, 1998). The dynamic and flexible nature of the Internet means that any ISP or retail customer of which a provider of long-haul backbone services attempted to take advantage would be able to respond easily and quickly and to find an alternative supplier (if it were not already multi-homed).

36/ *See In re Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, 13 F.C.C.R. ¶¶ 18-22 (Aug. 7, 1998).

37/ Background and details concerning xDSL service can be found in *In Re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Dockets Nos. 98-147 *et al.*, FCC 98-188 access, xDSL services have the potential for widespread deployment at affordable prices that has eluded ISDN and other offerings. In particular, it promises to become a leading option for small and medium businesses and residential consumers that want high-speed Internet access but that would not purchase more expensive high bandwidth services like T-1 service. An independent study released in early November confirmed the growing importance of high-bandwidth delivery of Internet services when it found that 84 percent of residential Internet users want high-bandwidth Internet access, and the consumers most willing to pay for high-bandwidth service vastly prefer xDSL service over current competing cable modem options.[38/]

Thus, although few consumers are able to utilize xDSL services today (because ILECs, including Bell Atlantic and GTE have effectively prevented competition to provide them from getting started), these services may become the predominant form of Internet access in the future. The ILECs' current and future bottleneck control over a principal method of Internet access could enable them to reduce overall Internet competition.

Both Bell Atlantic and GTE currently provide xDSL services to customers, and GTE claims to be the "industry leader" in the introduction of xDSL service.[39/] GTE first conducted extensive tests of ADSL in 1996, providing high-bandwidth services to Microsoft employees in Washington state.[40/] GTE now offers xDSL service in 16 states across the country. Similarly,

---

(rel. Aug. 7, 1998).

38/ *See* Press Release, *Yankee Group Finds Consumer Demand for High-Speed Internet Services Growing, but Availability is Limited,* (Nov. 6, 1998) http://www.yankeegroup.com/yg.nsf.

39/ *See* "DSL is Now a Reality for GTE Internet Users," http://www.gte.net/announcements/dsl.html.

40/ Bob Woods, *GTE Adds 1,000 Microsoft Employees & 2 Universities to ADSL Trial,* Newsbytes, May 7, 1997.

Bell Atlantic is actively deploying xDSL in its region,[41] and has geared its long term data strategy to coordinate with its ADSL service.[42]

Now and for some time to come, Bell Atlantic and GTE, like other ILECs, will have a virtually complete monopoly over these services, especially for residential and small business customers. Their control will remain regardless of whether the Commission grants the ILECs any relief from the requirements of section 251 (for example, with respect to access to xDSL-equipped loops and resale of advanced services), although such relief would further cement their monopoly choke hold over high-speed digital loop-based services. Neither Bell Atlantic nor GTE has met its most basic obligations under section 251(c) to provide unbundled access to xDSL-capable loops and collocation on reasonable and nondiscriminatory terms, including cost-based rates:

- Neither has deployed efficient, nondiscriminatory systems to give competing providers of advanced services access to xDSL-capable loops on the same terms and conditions as the ILEC or any ILEC data services affiliate.
- Neither conditions loops for competing providers on the same basis as it conditions loops for its own local services.
- Neither permits CLECs to place equipment on efficient and nondiscriminatory terms in ILEC end offices DSLAMs and other equipment necessary to provide xDSL services.
- Neither permits CLECs to place equipment in remote terminals so that CLECs can provide xDSL service to customers served by Integrated Digital Loop Carrier systems.

41/ Press Release, *New Bell Atlantic High-Speed ADSL Service to Shift Internet Surfers into HyperDrive*, (June 3, 1998) http://www.ba.com/nr/1998/Jun/19980603002.html.

42/ Press Release, *Bell Atlantic Launches Next-Generation Long Distance Data Network to Address $80 Billion Market for 21st Century*, (June 8, 1998) http://www.ba.com/nr/1998/Jun/19980608001.html.

Bell Atlantic's and GTE's failure to comply with section 251 effectively precludes competitors from competing to provide advanced local services.

It will likely take Bell Atlantic, GTE, and other ILECs at least several years to make xDSL-capable loops, collocation in central offices and remote terminals, and other xDSL-related elements and services available on reasonable and nondiscriminatory terms, so it will likely take effective competition in xDSL services at least several years to develop. Regardless of whether the ILECs obtain forbearance from current requirements under section 251(c), their monopoly over xDSL services is likely to continue because it will take time to bring them into compliance with the requirements with which even they admit they must comply. Developing the systems related to providing xDSL-capable loops is at least as complicated as providing unbundled voice-grade loops on reasonable and nondiscriminatory terms, and regular voice-grade loops are not available as an unbundled network consistent with the requirements of section 251(c) more than two years after the 1996 Act was passed. It may well take at least as long to work out all the operational and pricing issues relating to xDSL elements and services. Of course, if the Commission rejects (as it should) ILEC demands that they be relieved of the requirements of section 251(c) with respect to this category of local services, Bell Atlantic, GTE, and the other ILECs will have even more work to do to bring themselves into compliance, and in the meantime, their ISP business will continue to benefit from favorable treatment from their local telephone business.

Bell Atlantic's and GTE's continuing monopoly over advanced high-bandwidth services gives them, like other ILECs, a major advantage particularly in serving residential consumers and small business customers for whom T-1 and other traditional high-bandwidth services are not cost-effective. Not surprisingly, they are using this advantage to increase their Internet business.

Both Bell Atlantic and GTE are already bundling residential xDSL service with Internet access service by the ILEC's data affiliates,[43/] and at least Bell Atlantic is blatantly steering consumers to its own ISP. A consumer seeking to obtain ADSL service from Bell Atlantic receives a discount of over three hundred dollars on equipment and installation fees *if and only if* the consumer also signs up for one year of service from Bell Atlantic.net.[44/]

The Commission has already received extensive confirmation of the risk that ILECs will abuse their monopoly power over xDSL service to enhance their ISP business. In its comments in the Commission's section 706 proceedings, the Minnesota Department of Public Service detailed the monopoly abuses that are the subject of the formal complaint that it and the Minnesota Office of the Attorney General filed with the Minnesota Public Utilities Commission against U S West:

- U S West activated USWEST.NET's ADSL connection before any other ISP, and even in advance of the effective date of the tariff permitting the service;
- U S West provisioned its own ISP with necessary facilities "much sooner than it did for independent ISPs;"
- U S West timed a "free modem" promotion (similar to Bell Atlantic's modem discount promotion) in a way that customers of ISPs other than USWEST.NET were almost entirely excluded, the result of which was that "the overwhelming majority of end user customers who participated in U S WEST's promotion went to USWEST.NET as their ISP;" and

---

43/ *See* http://www.bell-atl.com/adsl/more_info/pricing.html; Press Release, *GTE to Offer Ultra-Fast Internet Access* (Apr. 13, 1998) http://www.bbn.com/ aboutbbn/presskit/980413.htm. SBC and Ameritech also bundle ADSL service with their own ISPs' Internet access service. *See* http://www.ameritech.net/visitors/adsl/adsl_faq.htm; http://public.pacbel.net/faq/dsl_faq.html. These World Wide Web pages are attached hereto as part of Exhibit 9.

44/ *See* http://www.bell-atl.com/adsl/more_info/pricing.html. Both SBC and Ameritech also grossly favor their own ISP in the provision of ADSL service. *See* http://www.ameritech.com/ products/data/adsl/index.html (listing only Ameritech.net as a provider of ADSL Internet service). *Compare* http://public.pacbell.net/dedicated/dsl/dsl_solutions.html ($299 for installation and all necessary hardware if the user signs a one year contract with Pacific Bell Internet) *with* http://www.pacbell.com/products/business/fastrak/adsl/pricing.html ($660 for installation and all necessary hardware to choose a different ISP). These World Wide Web pages are attached hereto as part of Exhibit 9.

- U S West's marketing of xDSL service heavily favored its own ISP.[45]

The Public Utility Commission of Texas explained other ways in which an ILEC could abuse its monopoly power over xDSL service to favor its own ISP:

> For example, to offer xDSL-based information services it is important to be aware of loop characteristics like the presence of bridge taps, load coils, etc. Depending upon the presence of such loop characteristics, the loop may need to be conditioned to make it suitable for offering xDSL-based information services. The ILEC may condition the loop and the advance services affiliate may deploy xDSL network elements (*e.g.*, digital subscriber line access multiplexers or DSLAMs) primarily in an area of interest to the affiliated information services provider. This action gives the ILEC's affiliates a strategic advantage over their competitors.[46]

Similarly, the Indiana Utility Regulatory Commission voiced significant concerns about favoritism among an ILEC's affiliates in the provision of xDSL services.[47]

As xDSL services become a predominant method of access to Internet services, BA-GTE could achieve market power over Internet services by leveraging its monopoly over these services to capture a large and disproportionate share of the Internet business. By increasing Internet traffic from customers locked into Bell Atlantic-GTE's Internet service through bottleneck abuse, the merger may give Bell Atlantic-GTE the ability to exploit a lopsided share of Internet traffic in its dealings with other ISPs that need to exchange Internet traffic with it.

45/ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 98-147, Comments of the Minnesota Department of Public Services at 7-11 and Appendix a (FCC submitted Sept. 25, 1998).

46/ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Comments of the Public Utility Commission of Texas at 2-3 (FCC submitted Sept. 24, 1998).

47/ *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability* CC Docket No. 98-147, Comments of Indiana Utility Regulatory Commission and the Technical Staff of the Public Service Commission of Wisconsin at 6-9 (FCC submitted Sept. 24, 1998).

The merger will significantly increase the percentage of Internet customers to which Bell Atlantic-GTE controls access, and that percentage is certain to grow as xDSL technology is more widely deployed. With xDSL services as the preferred form of Internet access for a substantial group of users, the merger could begin a process that results in increasing numbers of Internet users moving to Bell Atlantic-GTE not because it offers better prices or superior service, but because Bell Atlantic-GTE has successfully raised the costs of rival ISPs, particularly those not part of other mega-BOCs. Increasing the costs of other ISPs that lack bottleneck control could in turn force those ISPs to raise their retail prices for Internet access and thereby cause a general increase in the retail prices. Or, alternatively, Bell Atlantic-GTE could use its anticompetitive price advantage to capture Internet business both inside and outside its region and then raise retail Internet prices to the extent it acquires market power. In either event, consumers would be the losers.

The risk of harm is not limited to Internet end users. If permitted to become through merger and bottleneck control a dominant ISP, BA-GTE would be able to exert power over Internet content providers and advertisers, including providers that do not use BA-GTE as their ISP. If BA-GTE provide Internet service to a significant percentage of end users, it could also create a new Internet "portal" and steer users to that site, thereby giving BA-GTE great influence over the providers seeking access to those users. BA-GTE would control the first screen that it displays to its customers, and content providers and advertisers that want to be featured on that screen would have to do business with BA-GTE on its terms. Indeed, GTE itself emphasized the importance of controlling the first screen displayed to Internet users in its antitrust case against all of the BOCs, including Bell Atlantic, for creating a cartel to monopolize the Internet Yellow pages market.[48] GTE alleged that the cartel uses its clout with devastating effect to force operators of the World Wide Web "portals" that many users see as their first screen on the Internet to steer users to the BOCs' Yellow Pages site.

The risk that Bell Atlantic-GTE could achieve dominance over the Internet is heightened by the fact that GTE is *already* a market leader in Internet services. In 1997, GTE acquired the BBN Corporation, which was one of the creators of the Internet and one of the leading brand names in the Internet business.[49] With GTE/BBN's broad presence and high name recognition,[50] Bell Atlantic would have both a significant head start toward dominating the Internet and easier market penetration.

If both Bell Atlantic-GTE and SBC-Ameritech are allowed to proceed with their mergers, the risk to Internet competition would increase substantially because the greater the consolidation of the remaining major ILECs, the greater the risk of coordinated interaction. Even if Bell Atlantic-GTE by itself would not achieve national market power over Internet services, Bell Atlantic-GTE and SBC-Ameritech together would control access to 70 percent of all Internet users. The shrinking number of ILECs that exercise bottleneck control over Internet access could facilitate coordinated interaction among the remaining mega-BOCs. In particular, Bell Atlantic-GTE and SBC-Ameritech could agree to exchange Internet traffic with each other on more favorable terms than they exchange traffic with non-bottleneck ISPs. The result could be an

---

48/ *See GTE New Media Services Inc. v. Ameritech Corp.*, No. 97-CV-2314 (RMCC), 1998 U.S. Dist. LEXIS 15413 (D.D.C. Sept. 28, 1998) (decision denying motion to dismiss).

49/ *See GTE Takes Action Toward Being a National Full-Service Provider*, Communications Daily, May 7, 1997.

50/ GTE has a nationwide Internet business, with a heavy presence in Bell Atlantic's existing territory. *See* Dedicated Access PoPs, http://www.bbn.com/products/maps/us_pop.htm; Dial-Up Access, http://www.bbn.com/products/maps/dl_us.htm.

effective Internet duopoly with Bell Atlantic-GTE and SBC-Ameritech impeding the ability of other ISPs to compete for the business of end users and content providers. *See* Baseman-Kelley Decl. ¶¶ 90-104.

B. Applying inflated access charges to local Internet access would increase the risk that mega-BOCs would achieve market power over Internet services.

The ability of ILECs to leverage their monopoly control over local services into market power over Internet services will be increased if they succeed in their current efforts to extend the current system of excessive access charges to calls from Internet users to their ISPs. By inflating the costs of competing ISPs, BOCs that provide Internet service along with local service would gain the same ability to impede Internet competition that BOCs have to impede competition in the long-distance market by unaffiliated long-distance carriers. The merger would mean that monopoly leveraging by Bell Atlantic-GTE would give it an even greater undeserved share of the Internet business and further threaten the ability of equally efficient and innovative ISPs to compete against the merged company.

By squeezing competing ISPs that must pay excessive access charges, and by tying its ISP service to advanced methods of Internet access, the combined Bell Atlantic-GTE threatens to appropriate enough Internet traffic to give it power in the national market for Internet services — if not unilaterally, then through coordinated interaction with other mega-BOCs. The increase in Internet traffic resulting from merger could give Bell Atlantic-GTE power (a) to extract more favorable terms from Internet content providers, outside as well as inside Bell Atlantic-GTE region, because users in the expanded region can get access to their content only through Bell Atlantic-GTE's expanded bottleneck, or (b) to capture the business of content providers from equally or more efficient ISPs because Bell Atlantic-GTE hinders their ability to provide competitively-priced connectivity to a large number of Internet customers held captive by Bell Atlantic-GTE. By using its artificial merger-enhanced advantage to capture more business from content providers, Bell Atlantic-GTE will increase its importance to other ISPs and to Internet end users and thereby gain additional power to increase the costs of other ISPs and raise retail prices.

This process could result in tipping the market more and more toward Bell Atlantic-GTE until it acquires monopoly power.[51] Simply as a result of the merger, Bell Atlantic-GTE would have a significantly greater share than either company would have without the merger. At a minimum, Bell Atlantic and GTE have not shown that the combined company's share of the Internet business would be so small as to eliminate the tipping concern. It is also clear that the risk of anticompetitive effects would be greatly increased if the Commission permits the SBC-Ameritech merger, because the risk of coordinated interaction would increase, as explained above.

Consistent with the public interest standard in section 310(d), the Commission has a duty under section 706(a) of the Telecommunications Act of 1996 to use its regulatory authority to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." The proposed Bell Atlantic-GTE merger threatens to create a substantial barrier to infrastructure investment. Consistent with the congressional directive in

---

51/ Opponents of the MCI-WorldCom merger claimed that combining MCI's and WorldCom's Internet business would produce a similar network tipping effect. *See MCI-WorldCom Order* ¶¶ 147-150. Here, however, customers and ISPs would have no choice but to deal with Bell Atlantic-GTE for the first or last mile of Internet connections. In contrast, customers and ISPs did have alternatives to MCI and WorldCom for Internet backbone services. Thus Bell Atlantic-GTE's control over local access to its customers would be far more complete than that of any large interLATA backbone provider, and the resulting threat to competition far more substantial. Nevertheless, even in the context of an interLATA backbone provider facing intense competition, the Commission required complete divestiture of any Internet overlap as a condition of the MCI WorldCom merger.

section 706(a), the Commission should use its authority over the requested transfer of control to prevent the formation of this barrier.

IV. THE MERGED COMPANY MAY NOT PROVIDE ANY INTERLATA TELECOMMUNICATIONS OR INFORMATION SERVICE IN ANY IN-REGION STATE WHERE BELL ATLANTIC LACKS 271 AUTHORITY.

Bell Atlantic and GTE drop a bomb into one footnote in their application. The footnote reads in full:

> Bell Atlantic hopes to have needed Section 271 approvals by the time this merger closes. If that process is not complete, applicants will request any necessary transitional relief from the Commission.

BA-GTE Appl. 19 n.14. But section 271 of the Act does not allow for any "transitional relief." The Commission should make that clear to Bell Atlantic and GTE sooner rather than later, so that Bell Atlantic does not proceed under the illusion that it will be permitted by merger to circumvent the critical market-opening incentives created by section 271. As it did in its *SBC-SNET Order*, the Commission should make clear that if this merger is permitted to go forward, it will require a complete divestiture of GTE's interLATA business in all Bell Atlantic states for which Bell Atlantic has not obtained section 271 authority prior to closing of the transaction. This divestiture would necessarily include all interLATA information services currently provided by GTE in Bell Atlantic's region, including Internet services, because, as the Commission has held, the section 271 prohibition against a BOC or its affiliates from providing any interLATA service applies to interLATA information services as well as interLATA telecommunications services. Finally, the acquisition of GTE by Bell Atlantic means that all of the merged entity's operations in Pennsylvania and Virginia, including in current GTE territories, must be found to comply with section 271 before Bell Atlantic-GTE can offer interLATA service anywhere in those states, and that all present GTE territories must comply with the conditions imposed in the *BA-NYNEX Order* (as ineffective as those conditions have been so far).

A. Section 271 does not allow for transitional relief.

Either Bell Atlantic fully implements the competitive checklist and meets the public interest test before the merger, or section 271 flatly prohibits Bell Atlantic, directly or through an affiliate, from providing in-region interLATA services. Section 271 makes no provision for "transitional relief," and section 10(d), 47 U.S.C. § 160(d), prohibits forbearance from applying the requirements of section 271 until they have been fully implemented, because failure to enforce section 271 would defeat its very purpose — to "use[] the promise of long distance entry as an incentive to prompt the BOCs to open their local markets to competition." *In re Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-121 FCC 98-271 ¶ 3, (rel. Oct. 13, 1998) ("*FCC Louisiana II Order*").

If Bell Atlantic-GTE provides interLATA telecommunications or information services in-region directly or through GTE affiliates before its bottleneck is broken and it meets all section 271 requirements, "there is an unacceptable danger that they will use their market power to compete unfairly in the long distance market." *FCC Louisiana II Order* ¶ 3. Indeed, the whole statutory scheme of the Telecommunications Act of 1996 is premised on the reality that Bell Atlantic would have the ability and incentive to exercise local market power to impede competition in long distance and Internet services if it is able to offer those services before its local markets become competitive. *Id.* ¶ 3n.6 (citing 141 Cong. Rec. S8057 (1995) (statement of Sen. Dorgan) ("It is not fair for the Bell operating companies to have a monopoly in local service, retain that monopoly and get involved in competitive circumstances in long distance service.")).

It is critical for the Commission to make clear sooner rather than later that section 271 does not permit the "transitional relief" that Bell Atlantic-GTE muse about in their application. *See* BA-GTE Appl. 19 n.14. Otherwise, the prospect that Bell Atlantic will be able to avoid section 271 restrictions by providing interLATA services through GTE will immediately diminish Bell Atlantic's incentive to fully implement the 271 competitive checklist and to satisfy the section 271 public interest test. The longer that Bell Atlantic thinks that transitional relief may be possible, the slower it will be to come into full compliance with section 271. Bell Atlantic should not operate on any false impressions that "transitional relief" is possible.

B. Without section 271 authority, the merged company cannot provide interLATA telecommunications services to customers anywhere in the current Bell Atlantic region.

The immediate consequence of consummation of the merger would be that GTE would have to cease providing originating long distance service to customers in Virginia, Pennsylvania, and anywhere else in the current Bell Atlantic region where Bell Atlantic has not received section 271 authority. That is because the same section 271 prohibitions that apply to the current Bell Atlantic automatically would apply to the merged entity in Bell Atlantic's existing region. *See SBC-SNET Order* ¶ 36 ("in order to comply with Section 271, SNET and its subsidiaries must cease originating long distance traffic in SBC's current seven-state region"). As discussed below, this includes all interLATA services provided by GTE, including GTE Internetworking, in Bell Atlantic's region, whether interLATA telecommunications services or interLATA information services, including Internet services. *See* Part IV.C below. Requiring divestiture of GTE's long distance and Internet operations (including its interLATA network) in areas where Bell Atlantic has not yet received section 271 authority is the most straightforward type of condition, with the least impact on consumers, that would ensure compliance with section 271. Alternatively, GTE could be required simply to terminate service to all of its existing long-distance and Internet customers in Bell Atlantic's region, although that option would cause unnecessary disruption for customers.

As the Commission has recognized, there is vigorous competition in the long distance market and barriers to entry are low. *MCI-WorldCom Order* ¶¶ 36-77. Accordingly, the loss of GTE as a competitor in Bell Atlantic's region because of section 271 restrictions will not harm overall competition. And Bell Atlantic and GTE, if permitted to merge by the Commission, would have the same opportunity as every other BOC to get into the long distance business in-region — by fully implementing the section 271 competitive checklist and satisfying the public interest test.

C. A merged Bell Atlantic-GTE could not lawfully continue to provide Internet service to GTE Internetworking customers because Internet services are prohibited interLATA information services.

Not only will GTE have to cease providing interLATA telecommunications service to customers in Virginia, Pennsylvania, and elsewhere in the Bell Atlantic region where Bell Atlantic has not received section 271 authority, but GTE Internetworking would also have to cease providing Internet services supported by its interLATA backbone network or that of any other provider of Internet backbone services. *See In re Implementation of the Non-Accounting Safeguards*, First Report & Order and Further Notice of Proposed Rulemaking, 11 F.C.C.R. 21905 ¶ 115, CC Docket 96-149 (rel. Dec. 24, 1996); *cf. SBC-SNET Order* ¶ 36. Even Bell Atlantic and the other BOCs concede that they must have section 271 authority to provide services over interLATA data networks in their regions.[52]

52/ *See* Press Release, *Bell Atlantic Moves Forward to Meet Data Demand*, (Oct. 21, 1998), http://www.ba.com/nr/1998/Oct/19981021001.html (acknowledging that activation of data network depends on regulatory approval); Press Release, *Bell Atlantic Extends Data Network Capabilities Across U.S.*, (Sept. 21, 1998), http://www.ba.com/nr/1998/Sep/19980922001.html

As the Commission is aware, over two years ago MFS Communications Company (now a wholly owned subsidiary of MCI WorldCom) filed a still-unresolved challenge to Bell Atlantic's provision of Internet services.[53/] MFS demonstrated that Bell Atlantic's provision of Internet services violates the requirement that interLATA information services only be offered after compliance with section 271 and through a separate affiliate under section 272. The unlawfulness of Bell Atlantic's Internet service would be even more clear and indisputable if Bell Atlantic provides Internet service through GTE Internetworking.[54/] GTE provides telecommunications and information services over an interLATA network within Bell Atlantic's region. The continued provision of interLATA services over this network by the merged entity would be plainly illegal, and the Commission cannot permit the merger to proceed if it would create, or exacerbate, a violation of section 271.

To comply with section 271, the merged entity must stop providing interLATA telecommunications and information services, including Internet services, within the current Bell Atlantic region. Bell Atlantic-GTE should divest GTE's interLATA business, including its

---

(same).

53/ *See* Petition for Reconsideration, *In the Matter of Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Enhanced Internet Access Services*, CCBPol 96-09 (filed July 3, 1996) ("BA CEI Challenge"); Ex Parte Filing, BA CEI Challenge (filed Nov. 13, 1998); *see also* Ex Parte Filing of WorldCom, Inc., *In the Matter of Southwestern Bell Offer of Comparably Efficient Interconnection*, CCB-Pol 97-05 (filed July 7, 1997).

54/ Bell Atlantic attempts to avoid the clear prohibition of section 271 by claiming that its customers obtain interLATA Internet connections from a "Global Service Provider" ("GSP"). However, Bell Atlantic's pretense that its customers select a GSP is a farce, and cannot save Bell Atlantic's ISP offerings. *See* Ex Parte Letter from David N. Porter to William F. Caton, BA CEI Challenge (filed Aug. 21, 1997). But, for purposes of this merger review, the Commission need not resolve the GSP issue, because there is no similar pretense for GTE Internetworking's ISP business. There is no question that GTE Internetworking itself provides the interLATA component of the Internet services, and thus the merged entity may not provide these services absent authority under section 271.

interLATA network, to another company that may lawfully provide these services within these states. Before the Commission may approve the merger, Bell Atlantic and GTE should submit a plan (identifying critical components such as the identity of a purchaser and the terms and conditions of the transaction) to bring themselves into compliance to the extent that Bell Atlantic has not obtained section 271 authority at the time the merger closes.

D. In GTE territories acquired by Bell Atlantic, Bell Atlantic-GTE must fully comply with both section 271 and the Bell Atlantic-NYNEX merger conditions.

Section 271 does not currently apply to GTE, but it most certainly does apply to Bell Atlantic. For Bell Atlantic to get section 271 authority, *all* of its operations within a state, whether provided directly or by an affiliate *including any former GTE operations,* must fully comply with section 271, including the competitive checklist that incorporates the requirements of sections 251 and 252. GTE's right before the merger to offer interLATA service does not in any way alter Bell Atlantic's statutory obligations if Bell Atlantic is permitted to acquire GTE. The fact that Bell Atlantic would be reaching new homes and businesses in Virginia and Pennsylvania through merger rather than through routine growth does not alter Bell Atlantic's obligations to permit vigorous competition from CLECs to provide service to those homes and businesses.[55]

Similarly, the Bell Atlantic-NYNEX merger conditions expressly apply to "any affiliated companies" of Bell Atlantic, *BA-NYNEX Order* ¶ 249, and therefore would apply to a newly-acquired GTE.[56] Thus, GTE must comply with those conditions imposed by the Commission

---

55/ *See SBC-SNET Order* ¶ 37 (requiring SBC to ensure that SNET complies with all statutes and past and future Commission orders).

56/ The *BA-NYNEX Order* recognizes that Bell Atlantic provides its services "through network operations subsidiaries," *id.* ¶ 18, and GTE would simply be one additional such subsidiary. Indeed, if the merger is permitted, GTE will have exactly the same legal status as NYNEX after the merger with Bell Atlantic. *Compare id.* ¶ 23 ("NYNEX will survive as a wholly-owned subsidiary of Bell Atlantic") *with* Application for Transfer of Control at 2 ("GTE when it approved Bell Atlantic's acquisition of NYNEX. Moreover, especially in light of Bell Atlantic's recent arguments that the Commission lacks authority to enforce conditions, the Commission should require Bell Atlantic's and GTE's compliance with the Bell Atlantic-NYNEX conditions *prior* to permitting any additional mergers and should extend the term of those conditions because of Bell Atlantic's prolonged and inexcusable non-compliance.

V. THE COMMISSION SHOULD REQUIRE THE PARTIES TO SUBMIT ADDITIONAL INFORMATION AND DOCUMENTATION TO TEST THEIR CLAIMS THAT THEY WOULD NOT COMPETE AGAINST EACH OTHER IF THE MERGER DOES NOT OCCUR.

The Commission should closely scrutinize the assertions made by Bell Atlantic and GTE in light of the past history of Bell Atlantic's prior dealings with the Commission. As the Commission knows, there were serious questions about Bell Atlantic's candor about its plans to compete against NYNEX in the Commission's proceeding examining Bell Atlantic's merger with NYNEX. *See BA-NYNEX Order* ¶ 75 (comparing Bell Atlantic's statements in its FCC application to merge with NYNEX that it had no plans to compete against NYNEX with planning done at Bell Atlantic to compete against NYNEX and noting that the facts and circumstances of plans to enter out-of-region markets "should be forthrightly presented to the Commission"). The Commission should carefully examine such statements in Bell Atlantic's and GTE's current application such as there is "no basis for any conclusion that Bell Atlantic, on its own, would be an entrant" in GTE's territory and no "colorable basis for suggesting that GTE might be an economically significant entrant" in Bell Atlantic's territory. *See* BA-GTE Appl. 25-26 n.22. Careful scrutiny is required by Bell Atlantic's history of minimizing its out-of-region plans, by Bell Atlantic's and GTE's current insistence that competing out-of-region is critical to its future

---

will become a wholly-owned subsidiary of Bell Atlantic"). What applies to Bell Atlantic's NYNEX subsidiary would equally apply to Bell Atlantic's GTE subsidiary.

viability, by the facial implausibility of Bell Atlantic's and GTE's claims that they lack the resources to compete out-of-region unless they merge, and by significant evidence that GTE and Bell Atlantic would compete against one another. *See* Section II.B above (discussing testimony of GTE representative that GTE intends to compete against Bell Atlantic in West Virginia). In essence, the Commission must conduct an inquiry into whether Bell Atlantic's and GTE's primary justification for the merger — that they need to merge in order to compete out-of-region — is true.[57]

The only effective way for the Commission to conduct such an inquiry is to require Bell Atlantic and GTE to make available to Commission, and to interested parties under a protective order, all of the relevant documents relating to at least the following subjects:

- GTE Communications Corporation, the business unit created to compete against the BOCs
- GTE Internetworking's customer base and expansion plans in Bell Atlantic's region
- GTE's out-of-territory long distance customers in Pennsylvania and Virginia
- GTE's plans to provide wireline service with wireless switches (Kissell Aff. ¶ 13)
- Bell Atlantic's plans to extend its in-region long distance network out-of-region

---

57/ The Commission should also examine material that Bell Atlantic submitted under seal in GTE's antitrust lawsuit against Bell Atlantic and the other BOCs for monopolizing Internet Yellow Pages. *See* note 48 above. In particular, Bell Atlantic asserted counterclaims against GTE, including allegations that GTE had sought to "dominate its competitors." *See* Answer, Affirmative Defenses, and Counterclaims of Defendants Bell Atlantic Corporation and Bell Atlantic Electronic Commerce Services, Inc. *GTE New Media Services, Inc. v. Ameritech Corp.*, Civ No. 97CV02314 at 28, ¶ 6 (D.D.C. filed Nov. 14, 1997) (excerpts attached as Ex. 10). However, Bell Atlantic redacted from its public filing the support for this counterclaim. *See id.* In exploring the Internet competition issues raised by this merger, the Commission and interested parties should have access to factual claims made by one of the applicants about the other's anticompetitive acts.

- Bell Atlantic's plans to compete out-of region for local service, including its allegedly "highly targeted" plans to compete in GTE's Pennsylvania and Virginia territories (BA-GTE Appl. ¶ 31)
- Bell Atlantic's plans to compete against GTE Internetworking and other ISPs to capture additional Internet business in-region
- GTE's and Bell Atlantic's plans to provide bundles of local, long distance, and Internet services

Bell Atlantic and GTE are doubtless already collecting and providing these materials to the Antitrust Division of the Department of Justice as part of the Hart-Scott-Rodino process. Accordingly, as it did with the Bell Atlantic-NYNEX merger, the Commission should require Bell Atlantic and GTE to make part of the record in this proceeding the relevant Hart-Scott-Rodino materials submitted to the Department of Justice in connection with its investigation of the merger. *BA-NYNEX Order* ¶ 28.

VI. THE COMMISSION SHOULD DISAPPROVE THE BELL ATLANTIC-GTE MERGER.

As explained above, the proposed merger between Bell Atlantic and GTE raises a variety of serious threats to competition in local, Internet and long-distance markets. The most straightforward way to eliminate these threats, and to do so without regulatory conditions whose enforcement would consume substantial Commission resources, would be for the Commission simply to disapprove the merger.

To the extent the Commission considers approving the merger with conditions, the Commission should seriously consider structural conditions that would affirmatively boost competition. An alternative to structural conditions would be behavioral conditions that require Bell Atlantic-GTE to take specified procompetitive actions or prohibit it from taking specified anticompetitive actions. It is difficult to imagine any reasonably enforceable behavioral conditions that, individually or in combination, would be sufficient to make the merger affirmatively procompetitive. Unlike structural conditions, behavioral conditions require on-going regulatory oversight and enforcement because their goal is to make monopolists act contrary to their basic economic interests. Of course, Bell Atlantic has not complied with the behavioral conditions imposed in connection with its merger with NYNEX and has even contended that it may flout them with impunity because the Commission lacks the jurisdiction to enforce them. *See* Section II.A above .

Although it is not clear that all the problems inherent in a behavioral approach can be corrected, experience with Bell Atlantic and the Bell Atlantic-NYNEX merger conditions makes clear that at least two changes are necessary. First, any behavioral conditions on ILEC mergers would have to be very specific. For example, it was not enough to require in general terms that Bell Atlantic set rates for unbundled network elements based on unspecified forward-looking costs, or that Bell Atlantic negotiate in good faith about meaningful performance measurements, standards, and remedies. Second, any conditions must be implemented *before* the merger closes. Once two major ILECs merge, they lose all incentive to comply with the conditions, and the merged company would come up with one reason after another why compliance is infeasible or should be delayed. As a practical matter, the Commission can most effectively enforce any behavioral conditions before the ILECs complete a proposed merger.

CONCLUSION

The proposed merger of Bell Atlantic and GTE would harm the public interest because it would reduce local competition and threaten Internet and long distance competition. The application of Bell Atlantic and GTE should be denied. If the Commission decides to consider granting the application subject to conditions, it should seek public comments on specific potential conditions before reaching any conclusion.

Respectfully submitted,

MCI WORLDCOM, INC.

By: Lisa B. Smith /sm

Lisa B. Smith
R. Dale Dixon, Jr.
MCI WORLDCOM, INC.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-2383

David N. Porter
Richard S. Whitt
MCI WORLDCOM, INC.
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 776-1550

Anthony C. Epstein
John B. Morris, Jr.
Stuart M. Rennert
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Dated: November 23, 1998

CERTIFICATE OF SERVICE

I, Stuart M. Rennert, do hereby certify that I have on this 23rd day of November, 1998, served by first-class United States mail, postage paid, a true copy of the foregoing Comments Of MCI WorldCom upon the following:

Janice Myles *
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 544
Washington, D.C. 20554

Tom Krattenmaker *
Office of Plans and Policy
Federal Communications Commission
1919 M Street, NW
Room 650-K
Washington, D.C. 20554

Michael Kende *
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 544
Washington, D.C. 20554

To-Quyen Truong *
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 544
Washington, D.C. 20554

Lawrence E. Strickling *
Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 500
Washington, D.C. 20554

Carol Mattey *
Chief
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 544
Washington, D.C. 20554

Audrey Wright *
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 535-A
Washington, D.C. 20554

William P. Barr
Executive Vice President - Government and Regulatory Advocacy and General Counsel
GTE Corporation
One Stamford Forum
Stamford, Connecticut 06904

James R. Young
Executive Vice President - General Counsel
Bell Atlantic Corporation
1095 Avenue of the Americas
New York, New York 10036

ITS, Inc. *
1213 20th Street, NW
Washington, D.C. 20036

Chief
International Bureau
2000 M Street, NW
Room 800
Washington, DC 20054

Jeanine Poltronieri
Wireless Telecommunications Bureau
2025 M Street, NW, Room 5002
Washington, DC 20554

Chief
Commerical Wireless Division
2100 M Street, NW
Room 7023
Washington, DC 20554

Stuart M. Rennert

* Denotes Hand Delivery